SUPREME COURT, U.S. 74-261

FILED
SEP 21 1974
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1974
No. A-1295

C. R. FEDRICK, INC., a corporation,

Petitioner

vs.

THE STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Respondent

Petition for a Writ of Certiorari to the Supreme Court of the State of California and to the California Court of Appeal, 2nd District, Division III

CLYDE R. MAXWELL
417 S. Hill St., Suite 601
Los Angeles, California 90013
(213) 620-1726

KARL F. GEISER
424 S. Beverly Drive
Beverly Hills, California 90212

Attorneys for Respondent

J. GALLAGHER — PRINTED BRIEFS (714) 547-6073

TABLE OF CONTENTS

	Page
INTRODUCTION	1
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
CONSTITUTIONAL QUESTIONS HEREIN WERE RAISED BELOW	6
NATURE OF THIS CASE	6
STATEMENT OF FACTS	7
IMPORTANCE OF THIS CASE	11
REASONS FOR GRANTING THIS WRIT	11
COMPARISON OF REGULATIONS SECTIONS 1521 and 1615 OF TITLE 18, CALIFORNIA ADMINISTRATIVE CODE	20
SUMMARY AND CONCLUSION	28

TABLE OF AUTHORITIES

	Page
City of San Joaquin v. State Bd. of Equalization, 9 C A 3d 365; 88 Cal Rptr 12 (1970)	19
Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U S 95,99; 62 S Ct 1,3; 86 L Ed 65	25
First Agriculture National Bank v. State Tax Commission (1968), 392 U S 339; 88 S Ct 2173	24,26
General Electric Co., v. State Bd. of Equalization 111 C A 2d 180; 244 P 2d 427 (1952)	15,16,17
Moses Lake Homes, Inc. v. Grant County, 365 U S 744; 81 S Ct 870; 6 L Ed 2d 66	2,11,28
Phillips Chemical Co. v. Dumas Independent School District, 361 U S 376; 80 S Ct 474; 4 L Ed 2d 384	2,11,23,28
Standard Oil Co. v. Calif. (1933), 291 U S 242; 78 L Ed 775; 54 S Ct 381 ..	27
Standard Oil Co. v. St. Bd. of Eq., 232 CA 2d 91; 43 Cal Rptr 543 (1965)	18

Codes:

California Administrative Code 12,13,14, 16,19,20, 21,22,28

California Revenue & Taxation Code 4,5,6,12, 13,15,17,18,20,24,27

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1974
No. A-1295

C.R. FEDRICK, INC., a corporation,
Petitioner

-vs-

THE STATE BOARD OF EQUALIZATION OF
THE STATE OF CALIFORNIA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND TO THE CALIFORNIA COURT OF APPEAL, 2ND DISTRICT, DIVISION III.

The petition of C. R. Fedrick, Inc., a corporation, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the California Court of Appeal, 2nd District, Division III, filed February 27, 1974, as modified March 20, 1974 on denial of Petition for Rehearing; and to review the Judgment of the California Supreme Court denying Petitioner's Petition for Hearing in that Court by Minute Order dated April 24, 1974.

OPINION BELOW

The Opinion of the California Court of Appeal appears in the Appendix hereto and is reported in 38 CA 3rd 385; _____ Cal Rptr _____ and the Minute Order of the California Supreme Court denying the Petition for Hearing appears in the Advance Sheets of 11 C 3rd, No. 13, dated May 7, 1974, at page 8 thereof.

JURISDICTION

The Judgment of the California Court of Appeal was entered on February 27, 1974, and was modified on denial of Petition for Rehearing on March 20, 1974. A timely petition for hearing in the California Supreme Court was filed by Petitioner and hearing denied on April 24, 1974, on which date the judgment became final.

Pursuant to Petitioner's Application for an Extension of Time, on July 12, 1974, this Court, by the Honorable W. O. Douglas, Associate Justice, made its "Order Extending Time To File Petition For Writ of Certiorari" to and including September 21, 1974.

The jurisdiction of this Honorable Court is respectfully invoked under the provisions of Sec. 1257(3) of Title 28 USC and Rule 19 1(a) of the Supreme Court Rules.

QUESTIONS PRESENTED

1. Are Sections 6384 and 6007.5 of the Revenue & Taxation Code (hereinafter R & T Code) and Sections 1615 and 1521 of Title 18 of the California Administrative Code as interpreted and applied by the California Court of Appeal below, unconstitutional as constituting an invidious discrimination against the Federal Government and those with whom it deals, contrary to the rule of the cases of Moses Lake Homes, Inc. vs. Grant County, 365 U.S. 744, 81 S.Ct. 870, 6 L.Ed. (2d) 66, and Phillips Chemical Company vs. Dumas Independent School District, 361 U.S. 376, 80 S.Ct. 474, 4 L.Ed (2d) 384?

2. Are said Sections as so interpreted and applied unconstitutional under the Supremacy Clause of the United States Constitution (Article VI, Clause 2) and Sec. 107 of Title 4 USC ?

3. Is not Sec. 105 of the "Buck Act" (4 USC Sec. 105) wholly inapplicable to the facts in this case, and is not this case governed by Sec. 107 of said Act (4 USC Sec. 107) ?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. United States Constitution, Article VI, Clause 2, provides as follows:

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.."

B. Section 105 of Title 4 U S C (Buck Act) provides in material part as follows:

> "Sec. 105. State, and so forth, taxation affecting federal areas; sales or use tax.
>
> (a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area. ....."

C. Sec. 107 of Title 4 of the U.S. Code (Buck Act) provides in pertinent part as follows:

> "Sec. 107. The Same: exception of United States, its instrumentalities, and authorized purchases therefrom.
>
> "(a) The provisions of Sections 105 and 106 of this Title shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser ..."

D. Section 6384 of the California Revenue and Taxation Code (hereinafter R & T Code) provides as follows:

> "Sec. 6384. United States Contractors
> Notwithstanding any other provision of law the tax imposed under this part shall apply to the gross receipts from the sale of any tangible personal property to contractors purchasing such property, either as agents of the United States or for their own account and subsequent resale to the United States for use in the performance of contracts with the United States for the construction of improvements on or to real property in this state."

E. Section 6007.5 R & T Code provides:

> "Sec. 6007.5. (United States Contractors). A sale of tangible personal property to a contractor or subcontractor for use in the performance of contracts with the United States for the construction of improvements on or to real property in this State is a retail sale. The

gross receipts from such a sale or the sales price of property so sold shall be included in the measure of the taxes imposed by this part."

F. Section 6381, R & T Code provides as follows:

"Sec. 6381 United States. There are exempted from the computation of the amount of the sales tax the gross receipts from the sale of any tangible personal property to:

(a) The United States, its unincorporated agencies and instrumentalities;

(b) Any incorporated agency or instrumentality of the United States wholly owned by the United States or by a corporation wholly owned by the United States;

(c) The American National Red Cross, its chapters and branches.

This exemption does not extend to the rentals payable under a lease of tangible personal property."

G. Section 6352 R & T code provides as follows:

"Sec. 6352. Exempted from the taxes imposed by this part.

There are exempted from the taxes imposed by this part the gross receipts from the sale of and the storage use, or other consumption in this state of tangible personal property the gross receipts from the sale of which, or the storage, use, or other consumption of which, this state is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this state."

CONSTITUTIONAL QUESTIONS HEREIN WERE RAISED BELOW

Under date of October 31, 1973, in a letter from the Clerk of the California Court of Appeal for the Second Appellate District addressed to attorneys for both parties herein, the Clerk advises that he has been directed by the Court of Appeal to request that the parties file additional briefs in the above entitled matter addressed to the following questions, among others:

> "... That is to say, does Revenue and Taxation Code, Sec. 6384, violate the sovereign authority of the Federal Government? ..."

And at page 392 of the Court of Appeal Opinion (page 13 of the Appendix) this is recognized wherein the Court says:

> "In a supplemental brief filed at the request of this Court, Respondent argues that Section 6384 is unconstitutional ..."

NATURE OF THIS CASE

This was an action for refund brought by the Petitioner (taxpayer) against the Respondent (The Administrative Agency of the State of California charged with the collection of Sales and Use taxes) after the exhaustion of Petitioner's administrative remedies for the refund of California sales and use taxes, seeking repayment in the amount of $13,129.48, and the Complaint alleged inter alia that the determination of tax ".... erroneously included machinery and equipment furnished and sold to the United States Government or sold for resale to other contractors for sales to the United States Government or its agencies which were not properly taxable to the plaintiff. ...." A nonjury trial resulted in a judgment for Petitioner in the sum of $7,931.76 in refund of tax, $1,513.35 interest, and in favor of the

Respondent on the balance of Petitioner's claim and interest.

In paragraphs VI, VII, VIII (page 341 to 343, Clerk's Transcript; Appendix commencing at page 25) the Trial Court found as a fact that the items here in contention were "machinery and equipment" and hence exempt under Regulation 1615 of the Respondent (18 Cal. Admin. Code Sec. 1615).

STATEMENT OF FACTS

C. R. Fedrick, Inc., Petitioner (hereinafter "Fedrick") is and was at all times material herein a California corporation and a "seller" duly permitted by the Respondent California State Board of Equalization (hereinafter "Board") to engage in the sale of tangible personal property within the State of California, and did file California Sales and Use Tax returns and pay the taxes as shown thereby at the time and in the manner required by Law, including the payment (on audit by the Respondent) of tax on all of the items disputed herein.

During the period in question, Fedrick entered into various construction contracts with the United States Government, an agency or agent of the United States Government, pr prime contractors to the United States Government, principally for the purpose of furnishing and installing electrical and mechanical systems at Air Force and Naval Air Station installations. Fedrick examined the articles to be furnished and installed by it for the purpose of defining its liability for California Sales and Use Tax, and determined that some of the items of personal property to be furnished and installed under the terms of the contract were sales of machinery and equipment or other personalty to the United States Government, and hence exempt from sales and use tax

under the applicable Revenue and Taxation Code statutes and regulations of the Board. Certain items of tangible personal property were purchased by Fedrick with the tax being paid to the seller or vendor and other items were purchased with the tax excluded, the same being certified to the seller as a purchase for resale to the United States Government, and reported same to the Board accordingly.

Subsequently, the Board caused an audit to be made of the accounts of Fedrick, assessing additional sales and use taxes against Fedrick for the period here in question in the amount of $11,102.16 and interest of $1,971.81, for a total assessment of $13,073.97, which amount was paid to the Board pursuant to its notice of redetermination, and thereafter, as provided by statute, Fedrick filed with the Board its claim for refund in the amount paid, which claim was denied, which exhausted Fedrick's administrative remedies, and they thereupon proceeded to file this action for refund within the time and in the manner prescribed by law.

The subcontracts which were performed by Fedrick for United States Government prime contractors or other subcontractors for the United States Government were done at the following installations: March Air Force Base, Riverside, California; Siskiyou County Airport; Senator Wash Dam; Lawrence Radiation Laboratory; George Air Force Base; Hamilton Air Force Base; Alameda Naval Air Station; and the Naval facility at Point Arguello.

It was stipulated that the installation at March Air Force Base was typical and that the Court's decision relative to these installations and the taxability of items included therein would apply similarly to the other installations.

At March Air Force Base, Fedrick as subcontractor to the prime contractor to the United States Corps of

Engineers furnished and installed certain electrical systems required for the operation of the instrument landing system, including equipment, controls, connections, transformers, switches, circuit breakers, primary fuse cutouts, oil fuse cutouts, remote control oil switches and sectionalizing boxes. The items included in the above description which have been taxed by the Board are reinforcing steel, transformers, switch gear, distance markers and miscellaneous items which were found by the *Trial Court* to be machinery and equipment and the amount of the assessment paid by Fedrick on the above items was $2,270.01, which was comprised of $1,913.12 in taxes and $356.89 in interest (Trial Court's Finding number VI, page 341, Clerk's Transcript).

In the same capacity and in the same place, Fedrick furnished and installed a complete electrical duct system underground, including a 5,000 volt primary cable and wires, to be used as a communications and electrical distribution network; said system was comprised of a concrete encased duct system, manholes, handholes, series lighting cable system, cable marker tags and accessories, all as required by the United States Corps of Engineers' specifications.

The items included in the above description which have been taxed by the Board are manholes consisting of cement, frames and covers, and reinforcing steel, sand and gravel used as a base for the conduit and runway and taxiway lights and bases attached to manholes and handholes. These items were found to be integral parts of an electrical transmission line which during the period in issue was considered to be personal property by long-standing policy of the Board following the issuance of an Opinion by the Attorney General of the State of California in 1936. The amount of the assessment made by Fedrick on the above items was

$2,128.17, comprised of $1,816.88 in taxes and $311.29 in interest. (Trial Court's Finding number VI, page 341-342, Clerk's Transcript; Appendix page 28).

In the same capacity and in the same place, Fedrick furnished and installed a diesel electric generator complete with piping, fuel system and various electrical connections required for same as required by its function as an alternate power source for the instrument landing system and other electrical systems at March Air Force Base, including the radar control consoles and equipment. The generator was connected to the lines for the operation of the electronic and visual aid facilities for the regulation of aircraft and was to have sufficient capacity to maintain operational facilities at the March Field facility in case of a failure or reduction of commercial power at March Air Force base. The items included in the above description which have been taxed by the Board are the diesel electric generator and switch gear, transformers and underground storage tank for the generator, which the Trial Court found to be machinery and equipment. The amount of the assessment paid by Fedrick on the above items was $3,569.38, comprised of $2,989.04 in taxes and $580.34 in interest (Finding number 8, pages 342-343 of Clerk's Transcript - Appendix page 29). For specificity, the items in controversy are more fully described in Appendix II to this brief.

None of the items in question, either alone or in combination with other items were necessary to any structure located on March Air Force Base, nor did they constitute a part of any structure so located on the Base. As above stated, all of the items in question had to do with electrical systems required for the operation of instrument landing systems, underground electrical duct system to be used as a communications and electrical distribution network, and a standby diesel electric gen-

erator system, and for the operation of electronic and visual aid facilities for the regulation of aircraft. An old system had been removed to put in the new system.

IMPORTANCE OF THIS CASE

While the dollar amount of tax in this case may appear to be insignificant, nevertheless this case presents principles involving literally millions of dollars in taxes which the Respondent Board has exacted and will further attempt to exact illegally and unconstitutionally from the Federal Government and from the Government contractors with whom it deals. There are now pending a great many cases in various stages of administrative proceedings before the Respondent Board and a great many cases pending in the Courts, all involving the questions here presented to this Honorable Court.

REASONS FOR GRANTING THE WRIT

1. Sections 6384 and 6007.5 of the California R & T Code (both supra) and Sections 1521 and 1615 of the California Administrative Code as interpreted and applied by the California Court of Appeal below are unconstitutional as constituting an invidious discrimination against the Federal Government and those with whom it deals, contrary to the Rule established by this Honorable Court in the cases of Phillips Chemical Co. v. Dumas Independent School District, 361 U.S. 376, 80 S.Ct. 474, 4 L.Ed.(2d) 384; and Moses Lake Homes, Inc. v. Grant County, 365 U.S. 744, 81 S.Ct. 870, 6 L.Ed.(2d) 66).

Petitioner contends that the Court of Appeal unfairly and discriminatorily treated the transactions in question as a use by the contractor with an agency of the United States Government (hence taxable), rather than a sale (hence tax exempt) to the United States Government.

California has developed a scheme of taxation relating to the imposition of sales and use taxes that compels a construction contractor selling equipment, supplies, and making improvements to real property for the United States Government to include in his costs and thereby pay to the State of California a sales or use tax on the wholesale acquisition cost of the items of personal property so sold to the United States Government. However, if the same work is performed for the State of California, a political subdivision thereof, or for another person, firm or corporation, the sale to the installer would be a sale for resale, exempt from the imposition of tax, and thereafter a sale by the installer at retail to the ultimate purchaser of the installation and therefore taxable.

The State of California, by reason of its taxing statutes (Revenue and Taxation Code Sec. 6384 and Sec. 6007.5) classifies as a terminal use by an installer items which are classified and treated as a sale by the installer at retail when the installation is for someone other than the United States Government. By this method, the State of California has successfully collected tax on sales to the United States Government amounting to substantial amounts of money because the installer is compelled by this scheme of taxation to add the amounts for sales or use tax into the cost of the materials or equipment sold to the United States Government. The Government is further prejudiced in these transactions due to the fact that the installer cannot and does not give a separately stated amount in his invoice or billing to the United States Government for tax reimbursement, and therefore, the United States Government has no ground or method by which it may recover the improperly paid tax in connection with the purchased installation.

By a comparison of Sec. 1615 and Sec. 1521 of Title 18 of the California Administrative Code, a trans-

action involving the installations of the items here in question by a contruction contractor on property owned by an individual or by the State of California, would be classified as a sale, and hence subject to a sales tax payable to the State of California under the provisions of Section (a)(4) of said Sec. 1521.

Contrast this with a situation where a construction contractor with the Federal Government or one of its agencies installs identical items on realty owned or leased by the United States Government. In that situation, the Court of Appeal in this case has so interpreted Sec. 6384 of the R & T Code and Sec. 1615 of Title 18 of the California Administrative Code to constitute such installations as a use by the contractor in an effort to make the transaction one which is not a sale to the United States Government (and thus exempt from tax). It is respectfully submitted that this is a distorted concept and is an unreasonable and impermissible classification by the State of California.

Not only does Sec. 6384 R & T Code and Sec. 1615 of Title 18 of the California Administrative Code discriminate against the Federal Government in this manner, but there is another discrimination in favor of the State of California, which arises in this way: As above stated, the installation of the items in question by a contractor with the State of California (or any of its subdivisions or any municipality) would be subject to a sales tax under the definition of "fixtures" as contained in said Section 1521 of Title 18 of the Administrative Code. The tax on these items would be paid by the construction contractor to the State of California, and therefore, even though the State would be charged in the first instance with reimbursement for the tax, nevertheless, in the final instance the State receives the tax from the construction contractor and the net effect is that the State has enjoyed a tax-exempt transaction.

Under a long-standing rule (Rule 12) of the Respondent Board (now incorporated into the Statutory Law of California as Sec. 1615, Title 18, California Administrative Code; page of the Appendix) and under long-established rules of "trade fixtures" the transactions were in truth and fact sales of "machinery and equipment", i.e., trade fixtures.

Said Section 1615 in substantially its present form was adopted by the Respondent Board in World War II and provides that California Sales and Use Taxes did not apply to sales of "machinery and equipment" to contractors and the term "machinery and equipment" is defined to mean property to which each of the following conditions applies:

1. It is not used by the contractor in making the improvements (as distinguished from tools, shovels, cranes, etc.).

2. It is not attached to the realty, or if attached, is readily removable as a unit.

3. It is installed for the purpose of a manufacturing operation or some other function not essential to the structure itself.

4. Title to the property passes to the United States before the contractor makes any use of it.

Among the examples of "machinery and equipment" are lathes, drills, presses, cranes and other machinery and apparatus "which may be fastened to the realty but which can be removed without damage to the structure or without substantially impairing its use."

Under Regulation 1615, "fixtures" are distinguished from "machinery and equipment" and defined as things "which are necessary to a structure and so firmly attached to the realty as to constitute a part of the structure. They are essential to the use of the building or other structure. ..." and fixtures are subject to a use tax

in the hands of a contractor. Typical of these are lighting fixtures, pumping fixtures, telephone switchboards and instruments, vault doors and equipment, etc.

It is apparent from the foregoing Statement of Facts and from the photographs that will be before this Court (Exhibits 1 to 21, inclusive) that the installations in question are obviously "machinery and equipment" and not subject to tax.

Typical of the installations here in question was a standby electric generator and switch gear, complete with piping, fuel system, control panel and various electrical connections required, which was designed for use as an alternate power source and which was automatically switched on in the event of failure of the main power source. (R.T. p. 82, line 6, to p. 83, line 17, and Exhibits 3 and 6).

In General Electric Company vs. State Board of Equalization, 111 C A 2d 180, 244 P 2d 427 (1952) (Petition for Hearing denied by the California Supreme Court), the case involved the question as to whether the manufacturer-installer of a 521-ton turbine generator unit (which upon installation became an improvement to the real property of the buyer) was taxable under the Sales and Use Tax Law as a seller at retail (Sales Tax) or as a consumer of the parts and materials of which the generator was composed (Use Tax). The sale in question was a sale to Pacific Gas & Electric Company of California, but the same rule would apply if the sale had been to the State of California, any one of its subdivisions, or a municipality (under the definition of a person as contained in Sec. 6005 [1] of the Revenue & Taxation Code.)

[1] Sec. 6005. ("Person") "Person" includes any individual, firm, copartnership, joint venture, association, social club, fraternal organization, corporation, estate, trust, business trust, receiver, assignee for the benefit

The generator weighed approximately 521 tons, was roughly 70 feet long, 22 feet wide and 19 feet high, and it was attached to a concrete foundation with large bolts and cement.

As in the instant case, the building housing the generator was constructed especially for that purpose, and accordingly, this case would appear to be on "all fours" with the General Electric case. In that case, General Electric asserted that it was subject to a use tax on $263,990.17, being the cost of "materials" used in the manufacture of the generator (Use Tax), pursuant to paragraph (a)(3) of Section 1521 [2] of Title 18, California Administrative Code, relating to "Construction Contractors" (not Government contractors).

The Defendant Board contended that the transaction was subject to a Sales tax as the term is defined in paragraph (a)(4) of said Section 1521 on the theory that the generator was a "fixture" as used in said Regulation, i.e., it was an accessory to a building which did not lose its identity as an accessory.

The Court in the General Electric case held that the generator was a "fixture" as defined in the Board's Rule 11, that the transaction in question was a sale of personal property and was subject to a tax upon the full contract price of $1,164,797.85.

After quoting the material portions of Ruling 11 (now Regulation 1521), the Court says, at page 187 of the Opinion:

---

1 (cont'd) of creditors, trustee, trustee in bankruptcy, syndicate, the United States, this State, any county, city and county, municipality, district, or other political subdivision of the State, or any other group or combination acting as a unit.

2 Appendix, p. 35 .

"By this rule the State Board has attempted to distinguish between 'structures' and 'fixtures'. Where the materials are combined with other materials so as to lose their identity and become part of the completed structure, the contractor is deemed to be the consumer of such materials and is required to pay a tax measured by Sec. 6201 of the Revenue and Taxation Code. But when the contractor, whether or not he is the manufacturer, furnishes a fixture that does not lose its identity upon annexation, the transaction is deemed a sale and is measured by Section 6051. Thus, in the construction of a structure the contractor is deemed to be engaged primarily in the sale of services, and is deemed to be a 'consumer' of the materials used. But in the construction, installation and sale of a fixture, the contractor is deemed to be a retailer of tangible personal property.

"It was under this rule that the State Board acted in treating the transaction here involved as the sale of a generator and not the sale of services. There can be no doubt that under this rule the transaction was a sale of tangible personal property and taxable as such. ..." (Emphasis added).

It is respectfully submitted that the Court of Appeal in this case totally ignored the well-established rule of the General Electric case, and that if the transaction in the General Electric case was a sale of a generator, then it must follow that the transaction in the instant case is likewise a sale of the generator (and by analogy a sale of all other items in question), and hence exempt from tax under Article VI, C1.2 (Supremacy Clause) of the United States Constitution and under the provisions of Section 107 of Title 4, USC.

These transactions are also exempt under the provisions of Sections 6352 [3] and 6381 [4] of the R & T Code.

As stated above, all of the items in question in the instant case, including the electric generator, fit the definition of "trade fixtures", i.e., "machinery and equipment". In the case of Standard Oil Company vs. State Board of Equalization, 232 C A 2d 91, 43 Cal Rptr 543 (1965), the case involved the sale of a lease and all assets relating to a service station operation and the sale included all buildings, equipment, and improvements placed thereon by the seller. The equipment included gasoline pumps, lifts, hoists, compressors, loading racks, accessories and miscellaneous equipment, all of which were "transferred in place" and the manner of affixation was that customary for such items.

---

[3] Sec. 6352. (Constitutional Exemptions.) There are exempted from the taxes imposed by this part the gross receipts from the sale of and the storage use or other consumption in this state of tangible personal property the gross receipts from the sale of which, or the storage, use or other consumption of which, this state is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State. (Comp. Paragraph 60-202.)

[4] Sec. 6381. (United States.) There are exempted from the computation of the amount of the sales tax the gross receipts from the sale of any tangible personal property to: .

(a) The United States, its unincorporated agencies and instrumentalities;

(b) Any incorporated agency or instrumentality of the United States wholly owned by the United States or by a corporation wholly owned by the United States;

(c) The American National Red Cross, its chapter and branches.

This exemption does not extend to the rentals payable under a lease of tangible personal property.

The State Board of Equalization sought to tax as a retail sale all of these items of machinery and equipment as tangible personal property. Standard Oil contended that all equipment affixed to the realty was a fixture and a part of the realty. The Court held that the equipment, even though affixed to the real estate in what might appear to be a permanent manner, was nevertheless "constructively severed" at the time of its affixation to the real estate; that these were trade fixtures, and hence the sale thereof was a sale of tangible personal property subject to sales tax.

See also the case of City of San Joaquin v. State Board of Equalization, 9 C A 3rd 365, 88 Cal Rptr 12 (1970) to the same effect.

On the following pages is a comparison of Sections 1521 and 1615, Title 18 of the California Administrative Code, dealing respectively with Construction Contractors (other than those dealing with the United States Government) and Construction Contractors dealing with the United States Government.

Section 1521 (a)(4) defines "fixtures" as things which are "accessory to a building and do not lose their identity as accessories when placed or installed and such installations are treated as sales subject to a sales tax."

By contrast, Section 1615 relating to contractors with the Federal Government defines "fixtures" as distinguished from "machinery and equipment" (exempt from tax) as things which are necessary to a structure and "so firmly attached to the realty as to constitute a part of the structure. They are essential to the use of the building or other structure. ..." (Emphasis added.) The examples of fixtures are identical in both cases.

In other words, if there was an installation of a fixture by a Construction Contractor under a contract with an individual, the State of California, its agencies or any municipality (among other "persons", as defined in Section 6005 R & T Code (supra)), the transaction would constitute a sale, but if an identical item is installed by a Construction Contractor for the United States Government or one of its agencies, it is not a sale, because to so classify it would render it exempt from tax.

COMPARISON OF REGULATIONS SEC. 1521 AND SEC. 1615 OF TITLE 18, CALIFORNIA ADMINISTRATIVE CODE

Sec. 1521 - Construction Contractors dealing with the State, its subdivisions, private persons, etc., other than U. S. Government.

"(3) The term "materials" as used herein means tangible personal property which when combined with other tangible personal property loses its identity to become an integral and inseparable part of the completed structure. "Materials" includes such things as:

Bricks
Builders' hardware
Calking material
Cement
Conduit
Electric wiring and connections
Flooring
Glass
Gravel
Insulation
Lath
Lead
Lime
Lumber
Macadam
Millwork
Mortar
Oil
Paint
Paper
Piping, valves and pipe fittings
Plaster
Putty
Reinforcing mesh
Roofing
Sand
Sheet Metal
Steel
Stone
Stucco
Tile
Wall Board
Wall coping
Wall Paper
Weather stripping
Wire netting and screen
Wood preserver

"(4) The term "fixtures" as used herein means things which are accessory to a building and which do not lose their identity as accessories when placed or installed. "Fixtures" includes such things as:

Lighting fixtures
Plumbing fixtures
Furnaces, boilers and heating units
Air conditioning units
Refrigeration units
Telephone switchboards and instruments
Elevators, hoists and conveying units
Awnings and venetian blinds
Burglar alarm and fire alarm fixtures
Vault doors and equipment
Cabinets, counters and lockers (prefabricated)
Signs

(b) Materials Used by Contractors: (1) Contractors are the consumers of materials used by them in fulfilling construction contracts and the tax applies to the sale of such materials to the contractors." (Emphasis added).

Sec. 1615 - Construction Contractors dealing with the U.S. Government only.

"Tax does not apply to sales of "machinery and equipment" to contractors or subcontractors. As used herein, the term "machinery and equipment" means property to which each of the following conditions applies:

1. It is not used by the contractor in making the improvements (as distinguished from supplies and tools, such as steam shovels, cranes, trucks, and hand or power tools, actually used to perform construction work).

2. It is either not attached to the realty or, if attached, is readily removable as a unit (as distinguished from "fixtures", see below).

3. It is installed for the purpose of performing a manufacturing operation or some other function not essential to the structure itself.

4. Title to the property passes to the United States before the contractor makes any use of it.

Examples of "Machinery and Equipment" are:

Portable machines, equipment and tools
Furniture
Vehicles
Lathes, drills, presses, cranes, and other machines and apparatus which may be fastened to the realty but which can be removed without damage to the structure or without substantially impairing its use.

"Fixtures," as distinguished from "machinery and equipment," are things which are necessary to a structure and so firmly attached to the realty as to constitute a part of the structure. They are essential to the use of the building or other structure, and include such things as:

Lighting fixtures
Plumbing fixtures
Furnaces, boilers and heating units
Air conditioning units
Refrigeration units
Cabinets, counters and lockers
Telephone switchboards and instruments
Elevators, hoists, and conveying units
Awnings and venetian blinds
Burglar alarm and fire alarm fixtures
Vault doors and equipment "

(Emphasis added.)

From the foregoing, it is apparent that California is taking the palpably inconsistent position that transactions similar to the ones in question here would be

characterized as a sale if the tangible personal property was sold to a construction contractor for the State of California (one of its subdivisions, a municipality, an individual, etc.), but it becomes a nonsale, or a use by the Contractor, if the transactions involve the sale of identical items to a contractor with the Federal Government, and hence taxable.

This Honorable Court in the recent Opinion of Phillips Chemical Co. vs. Dumas Independent School District, 361 U.S. 376, 80 S.Ct. 474, 4 L.Ed (2d) 384, has condemned such discrimination, saying at page 481 of the Opinion as reported in the Supreme Court Reporter:

> "None of these arguments urged in support of the Texas Classification, seems adequate to justify what appears to be so substantial and transparent a discrimination against the Government and its lessees. Here, Phillips is taxed under Article 5248 on the full value of the real property which it leases from the Federal Government, while businesses with similar leases using exempt property owned by the State and its political subdivisions, are not taxed on their leaseholds at all. The differences between the two classes, at least when the Government's interests are weighed in the balance, seem too impalpable to warrant such a gross differentiation. It follows that Article 5248 as applied in this case, discriminates unconstitutionally against the United States and its lessee. As we had occasion to state, quite recently, it still remains true, as it has from the time of M'Culloch vs. Maryland, 4 Wheat 316, 4 L.Ed 579, that a state tax may not discriminate against the Government or those with whom it deals. (Citations.) Therefore, this tax may not be exacted." (Emphasis added).

This inequity was further demonstrated at the trial by the cross examination of Mr. Jack D. Paulson, Tax Counsel for the Board. Mr. Paulson's statements bring out the inequities accruing to the Federal Government and displays the preference to State and Municipal Governments over the Federal Government without reservation. He clearly testifies that on a sale of a generator, for example, to the Federal Government, the contractor must pay a use tax on his cost of materials which tax is necessarily passed on to the Federal Government; whereas the same generator installed for the State of California would be deemed a sale, not a use, by the contractor and sales tax would be imposed, this tax later to be returned to the State by the contractor when he files his return. Mr. Paulson's pertinent testimony has been included herein as Appendix 3.

2. Sections 6384 and 6007.5, supra, of the California Revenue & Taxation Code as interpreted and applied by the California Court of Appeal below are unconstitutional under the Supremacy Clause of the Constitution (Article VI C1.2) and under Section 107 of Title 4 USC (both supra).

This statement would seem to follow as a corollary to Division 1 hereof because the impermissible and unconstitutional discrimination as between State and Federal Governments results in an effort by the State to levy a sales tax against the Federal Government with those with whom it deals. It has long been held that the State has no such power.

This Honorable Court has recently addressed itself to the question as to the power of a state to levy a tax against an instrumentality of the Federal Government. In the case of First Agriculture National Bank vs. State Tax Commission (1968) 392 U.S. 339, 88 S. Ct. 2173, an action by a National Bank against the Massachusetts

State Tax Commission for declaratory relief as to whether a National Bank was subject to Massachusetts Sales and Use taxes on purchases for its own use of tangible personal property. This Honorable Court held that the National Bank is immune from both Massachusetts Sales and Use taxes, saying at page 2178 of the Opinion as reported in the Supreme Court Reporter:

> "It would appear to be indisputable that a sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser. See Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95, 99, 62 S.Ct. 1,3, 86 L.Ed 65 Subsection 3, of the Massachusetts sales tax provides:
>
> > 'Reimbursement for the tax hereby imposed shall be paid by the purchaser to the vendor and each vendor in this commonwealth shall add to the sales price and shall collect from the purchaser the full amount of the tax imposed by this section, or an amount equal as nearly as possible or practicable to the average equivalent thereof; and such tax shall be a debt from the purchaser to the vendor, when so added to the sales price, and shall be recoverable at law in the same manner as other debts.' Acts and Resolved, 1966, c. 14 Sec. 1, subsec. 3 (Emphasis added.'
>
> "This subsection reads to us as a clear requirement that the sales tax be passed on to the purchaser. And this interpretation is reinforced by subsection 23 which prohibits as unlawful advertising the holding out by any vendor that he will assume or absorb the tax on any sale that he may make. We cannot accept the reasoning of the court below that simply because there is no sanction against a vendor who refuses to pass on the tax (assuming this is true),

this means the tax is on the vendor. There can be no doubt from the clear wording of the statute that the Massachusetts Legislature intended that this sales tax be passed on to the purchaser. For our purposes, at least, that intent is controlling. And it seems clear to us that the force of the law, especially the language in subsection 3, is such that regardless of sanctions, businessmen will attempt, in their everyday commercial affairs, to conform to its provisions as written.

"(8) For these reasons we reverse and hold that appellant is immune from both the Massachusetts use and sales taxes." (Emphasis added.)

At this point, we respectfully draw this Court's attention to the parallel between the provisions in the California Act and the Massachusetts Act in the First Agricultural National Bank case (supra). Copies of the pertinent California Act appear in the Appendix at page 38 .

It will be observed that Section 6052 provides that "The tax hereby proposed shall be collected by the retailer from the consumer insofar as it can be done."

Section 6053 makes it "...unlawful for any retailer to advertise or hold out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold, or that if added, it or any part thereof will be refunded. Any person violating any provisions of this Section is guilty of a misdemeanor."

It is apparent from Section 6052.5, which sets out the Sales Tax Reimbursement Schedule, that the tax is to be passed on to the purchaser. Furthermore, the authorization in Section 6054 requiring the retailer to disclose the amount of tax collected separately from

the list price and the provisions in Section 6054.5 for return to the purchaser of excessive taxes collected from him by the retailer unless computed in accordance with the schedule set out in Section 6052.5 leads to the same conclusion. (See Appendix IV.)

3. The Court of Appeal below erred in applying Section 105 of the "Buck Act" (4 U.S.C. Sec. 105). Said Section 105 is wholly inapplicable to the facts in this case, and this case is governed by Section 107 of said Act (4 U.S.C. Sec. 107).

The "Buck Act" should be read in historical context which the Court of Appeal failed to do. The passage of that act was prompted by the Opinion of this Court in Standard Oil Company vs. California (1933), 291 U.S. 242, 78 L.Ed. 775, 54 S.Ct. 381, which held that a concessionaire operating on a Federal enclave was not subject to state taxes because of the provisions of Article I, Sec. 8, Clause 17, of the United States Constitution.

It should be noted that the language of said Section 107, supra, provides that no person should be relieved from liability for the payment of taxes levied by a state, etc. "... on the ground that the sale or use with respect to which such tax is levied occurred in whole or in part within a Federal area; ..." (Emphasis added.)

Petitioner's "ground" for denying liability for tax in this case is not that the transaction occurred within a Federal enclave but rather that the respondent was attempting to levy a sales tax on a sale to an instrumentality of the Federal government, and that such action is in violation of the Supremacy Clause of the United States Constitution and constitutes an invidious discrimination against the United States of America.

It should be further noted that Congress in passing

the "Buck Act" protected the government against such an unconstitutional and discriminatory levy by Sec. 107(a) of said Act, supra, wherein it provided:

> "The provisions of Sections 105 and 106 of this title shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, ..." (Emphasis added.)

Obviously, therefore, Section 105 of the "Buck Act" has no applicability to this case whatsoever.

SUMMARY AND CONCLUSION

It is respectfully submitted that the California Court of Appeal erred in matters involving Federal questions in the following particulars:

(1) Section 6384 and Section 6007.5 of the California R & T Code and Sections 1521 and 1615 of the California Administrative Code as interpreted and applied by the Court of Appeal below, are unconstitutional and void because as so interpreted and applied, they result in an invidious discrimination against the Federal Government and those with whom it deals, contrary to the rule established by this Court in the cases of Phillips Chemical Company and Moses Lakes, supra.

(2) The decision below results in a tax on sales to the Federal Government in violation of the Supremacy Clause of the United States Constitution and of Section 107 of the Buck Act.

(3) The Court of Appeal erred in applying Sec. 105 of the Buck Act which is wholly inapplicable to the factual situation in this case, and further erred in overlooking the clear mandate of Section 107 of the Buck Act.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the California Court of Appeal, Second District, Division Three, and to review judgment of the California Supreme Court denying a hearing.

DATED this 20th day of September, 1974.

Respectfully submitted,

CLYDE R. MAXWELL
567 San Nicolas Dr., Ste. 209
Newport Beach, Calif. 92660
Telephone: (714) 644-5232

and

KARL F. GEISER
424 South Beverly Drive
Beverly Hills, Calif. 90212
Telephone: (213) 879-3611

Attorneys for Petitioner

by _____
KARL F. GEISER

APPENDIX
TABLE OF CONTENTS

	Page
APPENDIX I	1
Decisions Below	1
Summary	1
Headnotes	2
Counsel	4
Opinion	4
Findings of Fact	25
Conclusions of Law	32
Title 18, Calif. Adm. Code, Sec. 1521	35
Title 18, Calif. Adm. Code, Sec. 1615	38
APPENDIX II	40
APPENDIX III	45
APPENDIX IV	58

APPENDIX

TABLE OF AUTHORITIES

	Page
Agricultural Bank v. Tax Commission (1968) 392 U S 339,347; 20 L.Ed.2d 1138, 1143-1144	13,18
Alabama v. King & Boozer, 314 U S 1; (86 L.Ed. 3; 62 S.Ct. 43; 140 ALR 615)	9,11, 12,14,17
Atlantic Oil Co. v. County of Los Angeles, (1968), 69 Cal 2d 585,599 (72 Cal Rptr 886; 446 P 2d 1006)	22
Flint v. Stone-Tracy Co., 220 U S 107	17
Gillespie v. Oklahoma, 257 U S 501	17
James v. Dravo Contracting Co., 302 U S 134 (82 L.Ed 155; 58 S.Ct. 208; 114 ALR 318)	10
Kern-Limerick, Inc. v. Scurlock (1954), 347 U S 110,112 (98 L Ed 546,551; 74 S.Ct. 403)	13,14,18
King v. State Bd. of Equalization, 22 Cal App 3d 1006 (99 Cal Rptr 802) ..	16,22,23 24
Long v. Rockwood, 277 U.S. 142	17
Market St. Ry. Co. v. Calif. St. Bd. of Eq. 137 Cal App 2d 87, 100-101 (290 P 2d 20)	24
Metcalf v. Eddy v. Mitchell, 269 US 514 ..	17
Panhandle Oil Co. v. Mississippi, 277 U S 218	17
Plummer v. Coler, 178 U S 115	17
Polar Co. v. Andrews (1964), 375 U S 361 (11 L Ed 2d 389; 84 S Ct 378)	10,13,14

	Page
Standard Oil Co. v. Calif., 291 U S 242 (78 L Ed 775; 54 S Ct 331)	9,10
Standard Oil Co. v. Johnson, 10 Cal 2d 758; 76 P 2d 1184	9
United States v. Mississippi Tax Comm., 412 U S 363 (37 L Ed 2d 1; 93 S Ct 2183)	11,13,14, 16
United States v. Nev. Tax Comm., (D. Nev. 1968), 291 F Supp 530 (affd. 439 F 2d 435)	13,14
Willcutts v. Bunn, 282 U S 216	17
Texts and Codes:	
Am Jur 2d, Sales & Use Taxes, Sec. 117 .	3
McKinney's Digest, Taxation Sec. 459 (3)(f)	2
Taxation Sec. 459 (6)(w)	3
Revenue & Taxation Code sections	2,4,5,6,7, 13,15,16
Rollman, Recent Developments in Sovereign Immunity of the Federal Government from State and Local Taxes, 38 NDL Rev. 26, 30	17

APPENDIX I

DECISION(S) BELOW
TRIAL COURT'S FINDINGS OF FACT AND
CONCLUSIONS OF LAW

CALIFORNIA ADMINISTRATIVE CODE
Sections 1521 and 1615

* * * * * * * *

(Civ. No. 40930. Second Dist., Div. Three.
February 27, 1974.)

(As modified Mar. 20, 1974, on denial of petition for rehearing.)

C. R. FEDRICK, INC., Plaintiff and Respondent,

v.

STATE BOARD OF EQUALIZATION, Defendant and Appellant

SUMMARY

The trial court entered judgment awarding part of a claim for refund of sales and use taxes paid by a subcontractor of the United States Corps of Engineers, and denying the counterclaim of the State Board of Equalization. The action involved items furnished by plaintiff in connection with alterations and improvements to military airfields and installations, including the installation of electrical systems. The court made findings attempting to distinguish between personal property which was machinery or equipment sold to the United States and therefore tax exempt under Rev.. & Tax. Code, Sec. 6381, and personal property used by the federal government to improve real property in the state, and

subject to tax under Rev. & Tax. Code, Sec. 6384. (Superior Court of Los Angeles County, No. 921001, Jerry Pacht, Judge.)

On appeal by the State Board of Equalization from the portion of the judgment adverse to it, the Court of Appeal reversed. It regarded certain findings of the trial court, erroneously characterizing improvements as machinery and equipment, as so interwoven with other findings as to be impossible of segregation. The court further held that the trial court erred in relying on board policy based on an Attorney General opinion that personal property used in construction of an electrical transmission line should be classified as personal property not used to improve real property. It was pointed out that the policy and opinion had been judicially held erroneous, and that codification of such policy by the Legislature was not applicable at the time in question. In conclusion, the court approved a finding of the trial court that a certain sale had occurred outside the state and was not subject to tax. (Opinion by Loring, J.,* with Cobey, Acting P.J. and Allport, J., concurring.)

HEADNOTES
Classified to McKinney's Digest

(1) Taxation Sec. 459(3)(f) - Sales Taxes - Constitutionality - Sales by or to Federal Agencies. -- Rev. & Tax. Code, Sec. 6384, subjecting to the sales tax, gross receipts from the sale of tangible personal property "for use in the performance of contracts with the United States for the construction of improvements on or to real property in this State." is not unconstitutional, even though the

---

* Assigned by the Chairman of the Judicial Council.

ultimate "incidence" of the tax is borne by the United States. By the Buck Act (4 U.S.C. Section 105), specifically authorizing states to impose use and sales taxes within federal enclaves with the same force and effect as if they were not federal territory, Congress has, to that extent, waived the sovereign immunity of the United States.

(2) Taxation Sec. 459(6)(w) - Sales Taxes - Exemptions - Sales to United States or Its Agencies. -- A judgment ordering a refund of certain sales and use taxes paid by a subcontractor of the United States Corps of Engineers in connection with alterations and improvements at military airfields and installations and denying the counterclaim of the State Board of Equalization, had to be reversed, where, though the trial court attempted to distinguish between personal property, which was machinery or equipment sold to the United States and therefore tax exempt under Rev. & Tax. Code Sec. 6381, and personal property used by the federal government to improve real property in the state, which was subject to tax under Rev. & Tax Code, Sec. 6384, certain findings erroneously characterizing improvements as machinery and equipment were so interwoven with the other findings that it was impossible to segregate them, and where, in making certain findings, the Court relied on board policy based on an Attorney General opinion that had been judicially held erroneous.

(See Cal Jur 2d, Sales and Use Taxes, Sections 16, 36, 37; Am.Jur.2d, Sales and Use Taxes, Section 117.)

COUNSEL

Evelle J. Younger, Attorney General, and Philip C. Griffin, Deputy Attorney General, for Defendant and Appellant.

Clyde R. Maxwell, Karl F. Geiser, Kopald and Mark, Richard M. Mark and Lawrence W. Hait for Plaintiff and Respondent.

OPINION

*Loring, J.** -- C. R. Fedrick, Inc., a California corporation (hereafter Fedrick) filed a complaint against the State Board of Equalization of the State of California as an agency of the State of California (hereafter Board) under Revenue and Taxation Code section 6933 [1] on a claim for refund of sales and use taxes seeking repayment of the sum of $13,129.48. In its complaint, Fedrick alleged that Board conducted an audit of plaintiff's business; it concluded that there was a deficiency in sales and use taxes and interest in the sum of $13,073.97 for the period July 1, 1962, to September 30, 1965; that the determination was erroneous because it was based on "grossly incorrect and arbitrary assumptions without foundation in fact . . . included items not taxable" or which were "not the obligation of the plaintiff"; "erroneously included machinery and equipment furnished and sold to the United States Government or sold for resale to other contractors for sales to the United States Government or its agencies which were not properly taxable to the plaintiff"; "erroneously included as taxable sales or uses items which had either been taxed at the source ... (or) which were not taxable at all to the plaintiff"; "erroneously included

* Assigned by the Chairman of the Judicial Council.

[1] Hereafter all Code sections refer to Revenue and Taxation Code unless otherwise noted.

items of labor and transportation expense"; included items "upon which plaintiff has reported and paid Sales Tax"; included items of machinery which "has not been sold or used and which is still in inventory." Other items of overpayment were alleged for the same period, making a total alleged overpayment of $13,129.48; that a claim for refund was filed July 6, 1967, and denied by Board on August 8, 1967, and notice of denial was given by mail on August 14, 1967.

After Board filed an amended answer and counterclaim, the parties entered into a stipulation of facts, which allowed for the introduction of additional evidence. The case proceeded to nonjury trial on April 29, 1971, which resulted in a judgment for Fedrick in the sum of $7,931.76 in refund of tax, $1,513.35 interest, and in favor of Board on the balance of Fedrick's claim of $3,023.08 tax and $434.03 interest The judgment was also in favor of Fedrick on the counterclaim. Fedrick was awarded costs.

Board appeals from those portions of the judgment in favor of Fedrick. Fedrick does not appeal from those portions of the judgment in favor of Board.

Contentions

1. Board contends that the use of Fedrick of various items of tangible personal property in the performance of the contract with the United States Government for the construction of improvements to California real property was a taxable use under sections 6384,[2] 6094,[3] and 6202.[4]

---

[2] Section 6384 reads as follows: "Notwithstanding any other provision of law the tax imposed under this part shall apply to the gross receipts from the sale of any tangible personal property to contractors purchasing such property either as the agents of the United States or for their own account and subsequent (cont'd)

2. The sale of capital equipment to Action Equipment Company was a sale subject to sales and use tax laws.

3. Fedrick cannot raise any legal issue in the action for refund not stated in the claim for refund.

4. The Board is entitled to judgment on its counterclaim.

---

2 (cont'd) resale to the United States for use in the performance of contracts with the United States for the construction of improvements on or to real property in this State."

3 Section 6094 reads as follows: "(a) If a purchaser who gives a resale certificate makes any use of the property other than retention, demonstration or display while holding it for sale in the regular course of business, the use shall be taxable to the purchaser under Chapter 3 (commencing with Section 6201) of this part as of the time the property is first used by him, and, except as provided in subdivisions (b) and (c) of this section, the sales price of the property to him shall be the measure of the tax.

"(b) If such use is limited to the loan of the property to customers as an accommodation while awaiting delivery of property purchased or leased from the lender or while property is being repaired for customers by the lender, the measure of the tax is the fair rental value of the property for the duration of each loan so made.

"(c) If the property is used frequently for purposes of demonstration or display while holding it for sale in the regular course of business and is used partly for other purposes, the measure of the tax is the fair rental value of the property for the period of such other use or uses."

4 Section 6202 reads as follows: "Every person storing, using, or otherwise consuming in this State tangible personal property purchased from a retailer is liable for the tax. His liability is not extinguished until the tax has been paid to this State except that a receipt (cont'd)

Facts

Fedrick was a subcontractor to the prime contractor, United States Corps of Engineers, under contract to furnish and install certain alterations and improvements of the airfields and air navigation equipment at March Air Force Base near Riverside, California,[5] the Siskiyou

4 (cont'd) from a retailer engaged in business in this State or from a retailer who is authorized by the board, under such rules and regulations as it may prescribe, to collect the tax and who is, for the purposes of this part relating to the use tax, regarded as a retailer engaged in business in this State, given to the purchaser pursuant to Section 6203, is sufficient to relieve the purchaser from further liability for the tax to which the receipt refers."

5 In their stipulation the parties agreed that at March Air Force Base Fedrick was to furnish and install the following items: "A. Certain electrical systems required for the operation of the instrument landing system including equipment, controls, connections, transformers, 5,000-volt cable and wires, switches, circuit breakers, primary fuse cutouts, oil fuse cutouts, remote control oil switches and sectionalizing boxes.

"B. A complete electrical duct system underground to be used as a communications and electrical distribution network; said system comprised of a concrete encased duct system, manholes, handholes, primary cable system, series lighting cable system, cable marker tags and accessories all as required by the United States Corps of Engineers' specifications.

"C. Cabling systems for the runway approach distance marker and taxiway lighting including runway, threshhold and taxiway lights, bases and foundations for lighting units, revisions to the existing cable system, the cabling system, the distance marker lights, the distance markers, the rehabilitation of existing approach lights, the addition of a condensor-discharge sequence flashing light system, its connection of the same through an existing vault or building containing (cont'd)

County Airport, Siskiyou County, California,[6] and certain similar improvements at other military airfields and installations.[7]

---

5 (cont'd) the necessary control equipment, and work necessary to connect the same with the control consoles in the control tower. The runway lighting system consisted of high-intensity runway circuits, the 5,000-volt leads, the entire system was to be connected to the regulators that would permit the controllers to regulate the intensity of the lighting as required by the visual approach conditions at the facility. There is a visual glide-slope indicating system consisting of transverse light bars, spaced and installed according to the specifications.

"D. A diesel electric generator furnished and installed complete with piping, fuel system and various electrical connections required for same as required by its function as an alternate power source for the instrument landing system and other electrical systems at March Air Force Base, including the radar control consoles and equipment. The generator was connected to the lines for the operation of the electronic and visual aid facilities for the regulation of aircraft. The generator was to have sufficient capacity to maintain operational facilities at the March Field Facility in case of a failure or reduction of commercial power at March Air Force Base."

6 In their stipulation the parties agreed that at Siskiyou Fedrick was to furnish and install the following items: "(a) Runway overruns; (b) Operational apron of Portland Cement for buildings and aircraft; (c) Approach lighting system; (d) Runway lighting system; (e) Aircraft shelter; (f) Maintenance dock; (g) Shop Maintenance building; (h) Ammunition storage; (i) An overhead outside distribution system; (j) Sewer service; (k) Domestic water; (l) Roads, and (m) Fuel distribution and storage for heating."

7 In their stipulation the parties agreed that Fedrick was to do work at other military air bases and installations such as Alameda Naval Air Station, Hamilton (cont'd)

In addition, Fedrick's claims for refund and complaint for refund included a claim for refund of sales and use taxes on the installation of various items of personal property in connection with a "linear acceleration installation," located on real property owned by Stanford University, and leased by it to the United States Government. The trial court decided that Fedrick was taxable on such items and, as noted, Fedrick does not appeal from that judgment.

Discussion

The Board claims that taxes are due from Fedrick under sections 6384, 6094 and 6202. Prior to 1941, there would have been, in our opinion, a serious question regarding the constitutionality of section 6384 under authority of Standard Oil Co. v. California, 291 U.S. 242 (78 L.Ed. 775, 54 S.Ct. 381). (See also Standard Oil Co. v. Johnson, 10 Cal.2d 758 (76 P 2d 1184).) However, in Alabama v. King & Boozer, 314 U.S. 1 (86 L.Ed. 3, 62 S.Ct. 43, 140 A.L.R. 615) the United States Supreme Court upheld the constitutionality of a state sales tax levied on and collected from a contractor which the contractor in turn collected from its customer, even though the customer was the United States of America and the contract was a cost-plus contract. Thereafter, in 1947, Congress passed Public Law 819 (Buck Act, 4 U.S.C. Sec. 105) which ceded to the states power to levy and collect sales and

7 (cont'd)Air Force Base, George Air Force Base, the naval facility at Point Arguello, Lawrence Radiation Laboratory and Senator Wash Dam, similar to that which was done at March Air Force Base and Siskiyou, and in addition the following: (a) Furnish and install a power check facility and turntable at Alameda Naval Air Station; (b) Furnish and install a natural gas main at Lawrence Radiation Laboratory; and (c) Furnish and install a pumping-generating plant at Senator Wash Dam.

use taxes "in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area."[8] The validity of such congressional act has been upheld by the United States Supreme Court. In Polar Co. v. Andrews (1964), 375 U S 361 (11 L Ed 2d 389, 84 S Ct 378) the Supreme Court said (at p. 383 (11 L Ed 2d at p. 403)): "Besides 4 U S C Sec. 105, enacted subsequent to James and Standard Oil, supra (James v. Dravo Contracting Co., 302 U S 134 (82 L Ed 155, 58 S Ct 208, 114 A L R 318); Standard Oil Co. v. California, supra, 291 U S 242), confers upon the States jurisdiction to levy and collect a sales or use tax 'in any Federal area,' and a sales or use tax is defined as 'any tax levied on, with respect to, or measured by, sales ... of tangible personal property ...'. 4 U S C Sec. 110. We think this provision provices ample basis for Florida to levy a tax measured by the amount of milk Polar distributes monthly, including milk sold to the United States for use on federal enclaves in Florida."

---

[8] The entire section reads: "Sec. 105. State, and so forth, taxation affecting federal areas; sales or use tax.

"(a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

"(b) The provisions of subsection (a) shall be applicable only with respect to sales or purchases made, receipts from sales received, or storage or use occurring, after December 31, 1940. July 30, 1947, c. 389, Sec. 1, 61 Stat. 641."

In United States v. Mississippi Tax Comm'n, 412 U.S. 363 (37 L.Ed. 2d 1, 93 S.Ct. 2183) (decided June 4, 1973), the Supreme Court was asked to consider the validity of a Mississippi state law imposing what appeared to be a tax on wholesale distributors of alcoholic beverages transported through Mississippi for sale at post exchanges on federal enclaves in Mississippi.

One of the arguments of the Mississippi State Tax Commission was that the tax should be considered as a sales tax which would therefore be valid under the Buck Act. A majority of the court concluded that the type of tax should be determined, at least initially, by the trial court and remanded the case, inter alia, for that purpose. In our view, the majority thereby tacitly held that if the tax were a sales tax it would be valid under the Buck Act. Justice Douglas, with Justice Rehnquist concurring, argued that the Supreme Court itself could determine that the tax was a sales tax, valid under the Buck Act, and no remand was necessary. The difference between the majority and minority opinions therefore was not over whether or not the Buck Act was constitutional, but over which court, the trial court or the Supreme Court, should initially determine whether or not the tax was a sales tax. Thus, in our view, all nine justices agreed that if the tax was a sales tax, it would be valid under the Buck Act. However, for our purposes the importance of the decision is the summary of the historical background of the Buck Act set forth in the opinion of Justice Douglas when he said (412 U.S. at pp. 386-388 (37 L.E.2d at pp. 18-19)): "At least since Alabama v. King & Boozer, 314 U.S. 1, state taxes have been upheld on those doing business with the Federal Government even as respects cost-plus contracts where the terms of the contract forced their payment out of the federal treasury. The principle of King & Boozer permits no exception for distillers who make wholesale transactions with post exchanges, as the le-

gal incidence of the tax is on the distillers, not on the post exchanges. Moreover, the Buck Act, 54 Stat. 1059, now 4 U.S.C. Sec. 105 et seq., authorizes the application of state sales and use taxes to all post exchange purchases where 'the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area.' The Buck Act exempts from such taxes, sales, purchases, storage or use of personal property sold by the United States or any instrumentality thereof to 'any authorized purchaser' (Sec. 107), who is defined as one permitted to purchase at commissaries, ship's stores, post exchanges and the like, by regulations of the departmental Secretary.

"It also does not authorize 'the levy or collection of any tax on or from the United States or any instrumentality thereof.' 4 U.S.C. Sec. 107(a).

"The markup which the State requires wholesalers of liquor to make is in its worst light a sales tax. There is no 'levy or collection' by the State from a post exchange in any technical, legal sense. As noted, the economic but not the legal incidence of the tax is in the post exchanges. The post exchange is merely paying indirectly the cost of doing business in the manner in which King & Boozer held that there was no constitutional immunity from the state taxation." (Fn. omitted.)

Justice Douglas further stated (at pp. 389-390 (37 L.Ed.2d at pp. 20-21)): "While the Buck Act by Sec. 107(a) bars a state tax on federal instrumentalities --which as Paul holds includes post exchanges -- King & Boozer allows a state tax on those who, like the wholesalers in this case, do business with the United States. King & Boozer, decided in 1941, after the Buck Act, stated the modern version of the scope of intergovernmental immunity. The present case is therefore on all fours with the excise tax imposed by Florida

on milk distributors who in turn sold to federal enclaves. In referring to the Buck Act we said: 'We think this provision provides ample basis for Florida to levy a tax measured by the amount of milk Polar distributes monthly, including milk sold to the United States for use on federal enclaves in Florida.' Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361,383." (Fn. omitted.)

(1) In a supplemental brief filed at the request of this court, respondent argues that section 6384 is unconstitutional under authority of cases later than Alabama v. King & Boozer (1941) supra, 314 U.S. 1, such as Agricultural Bank v. Tax Comm'n (1968), 392 U.S.339, 347 (20 L.Ed.2d 1138, 1143-1144, 88 S.Ct. 2173); United States v. Nevada Tax Commission (D. Nev. 1968), 291 F.Supp. 530 (aff'd. 439 F.2d 435); Kern-Limerick, Inc. v. Scurlock (1954), 347 U.S. 110,112 (98 L.Ed. 546,551, 74 S.Ct. 403) because the ultimate "incidence" of the tax is borne by the United States. As noted, United States v. Mississippi Tax Comm'n, supra, was decided on June 4, 1973, after the cases relied upon by respondent. It is the latest expression of the United States Supreme Court on the subject which we have been able to locate.

The cases are clearly reconcilable.

The Agricultural Bank case, supra, did not involve a question of permissible taxation within federal "enclaves" under the Buck Act (4 U.S.C. Sec. 105) but a question of whether a direct tax on an instrumentality of the federal government (a national bank) was within the scope of permissible taxation as authorized by Congress under title 12, United States Code section 548. The court held that title 12 United States Code section 548 prescribed the only ways in which a state could tax a national bank as authorized by Congress, and title 12 United States Code section 548 did not authorize a

sales tax or use tax on national banks. Kern-Limerick, Inc. v. Scurlock, supra, did not involve any question of a federal enclave or the applicability of the Buck Act. It involved the sale of a tractor directly to the Department of Navy through an authorized contractor. United States v. Nevada Tax Commission, supra, likewise apparently did not involve any question of state tax within a federal enclave; at least we do not find, either in the opinion of the District Court or of the Court of Appeal, any reference to the Buck Act (4 U.S.C. Sec. 105). The rationale of all of the recent cases is that Polar Co. v. Andrews, supra, and United States v. Mississippi Tax Comm'n, supra, involved cases where Congress had authorized the tax and thereby waived the sovereign immunity of the United States; the cases relied upon by respondent involve cases in which Congress had not authorized the tax and had not waived the sovereign immunity of the United States. Even if Alabama v. King & Boozer, supra, were no longer good law as respondent contends (a point which we do not decide) Congress, subsequent to that decision, enacted the Buck Act (4 U.S.C. Sec. 105) specifically authorizing states to impose use and sales taxes within federal enclaves with the same force and effect as if they were not federal territory. Congress thereby, and to that extent only, waived the sovereign immunity of the United States.

Despite some doubt on our part that Congress has power to confer legislative sovereignty on the states contrary to the provisions of article I, section 8, clause 17 of the United States Constitution, we are bound to follow the decisions of the United States Supreme Court which uphold the validity of that Congressional Act. (Buck Act, 4 U.S.C. Sec. 105).

We determine at the outset, therefore, that California has the constitutional power to impose sales and

use taxes on contractors in relation to work performed at the federal facilities involved in this case within the limits authorized by California statutes, "with the same effect as though such area was not a federal area" because Congress has expressly consented to such tax and thereby waived the sovereign immunity of the United States. (4 U.S.C. Sec. 105.)

The next question is: To what extent has California exercised this power? We are confronted with two statutory provisions: section 6381[9] and section 6384.[10] Section 6381 exempts from the sales tax "gross receipts from the sale of any tangible personal property to: (a) The United States ...." Section 6016[11] defines tangible personal property in effect as personal property which is in any manner "perceptible to the senses." However, section 6384 subjects to the sales tax gross receipts from the sale of tangible personal property "for use in the performance of contracts with the United States for the construction of improvements on or to

9 Section 6381 reads as follows: "There are exempted from the computation of the amount of the sales tax the gross receipts from the sale of any tangible personal property to: (a) The United States, its unincorporated agencies and instrumentalities; (b) Any incorporated agency or instrumentality of the United States wholly owned by the United States or by a corporation wholly owned by the United States; (c) The American National Red Cross, its chapters and branches. This exemption does not extend to the rentals payable under a lease of tangible personal property."

10 See ante, footnote 2.

11 Section 6016 reads as follows: "'Tangible personal property' means personal property which may be seen, weighed, measured, felt, or touched, or which is in any other manner perceptible to the senses."

real property in this State." The trial court concluded that if a particular item of tangible personal property was not for use in the construction of improvements on or to real property, particularly if it was machinery or equipment, it was exempt under section 6381, but that if such tangible personal property was for use in construction of improvements on or to real property in this state it was subject to sales or use taxes under section 6384. The court made elaborate findings that certain items of tangible personal property were machinery or equipment, or personal property not taxable under section 6381 and other items of personal property were found to constitute an "improvement on or to real property" which were taxable under section 6384. In finding No. VII the court found that certain personal property was used in the construction of an electrical transmission line and was exempt from sales or use tax under the Board's "long standing policy -- following issuance of an opinion by the Attorney General in 1936."[12] The court further found a retail sale of capital equipment by Fedrick to Action Equipment Company "occurred ourside of the State of California" and was not subject to the California sales or use tax.

(2) Our first function on this appeal is to reconcile, if possible, sections 6381 and 6384. Footnote 6 in United States v. Mississippi Tax Comm'n, supra, 412 U.S. at page 390 (37 L.Ed.2d at pages 20-21), sheds a great deal of light upon this problem. It reads: "6. During the first third of this century the doctrine of intergovernmental immunity, as it applies to state

12 As we shall see, infra, this policy was changed by the Legislature in 1965, by the enactment of section 6016.5, but the prior "policy" was held to be erroneous in King v. State Bd. of Equalization (1972), 22 Cal App 3d 1006 (99 Cal Rptr 802).

taxation of allegedly federal governmental activities, went through a highly expansive phase. Among the taxes held invalid were the following: sales tax on articles sold to the Government, Panhandle Oil Co. v. Mississippi, 277 U.S. 218; income tax on earnings from patents and copyrights, Long v. Rockwood, 277 U.S. 142; income tax on income derived by lessees of public lands, Gillespie v. Oklahoma, 257 U.S. 501.

"At the same time, however, a number of inroads or qualifications on the doctrine were established. Among the taxes held valid were the following: corporate franchise tax measured by income including that from government bonds, Flint v. Stone-Tracy Co., 220 U.S. 107; inheritance or estate tax measured in part by government bonds, Plummer v. Coler, 178 U.S. 115; income tax on capital gain on resale of government bonds, Willcutts v. Bunn, 282 U.S. 216; income tax on net income of contractors with the Government, Metcalf & Eddy v. Mitchell, 269 U.S. 514. This trend culminated in the decision of the Court in Alabama v. King & Boozer, 314 U.S. 1.

"That trend led a commentator to note, 'Today, the United States conducts much of its business through a vast number of private parties. The trend in the U.S. Supreme Court has been to reject immunizing these private parties from nondiscriminatory state taxes, as a matter of constitutional law, even though the United States bears the economic brunt of the tax, indirectly in some instances, by inclusion in price, and more directly in many instances, by reimbursement to the contractor as an item of cost.' Rollman, Recent Developments in Sovereign Immunity of the Federal Government from State and Local Taxes, 38 N.D.L. Rev. 26, 30."

However, notwithstanding this broadening of the state versus federal government tax concept in favor

of the states, we have found no decision of the United States Supreme Court which sanctions a state tax directly on the federal government, its functions, or instrumentalities. The cases relied upon by respondent, Agricultural Bank v. Tax Comm'n, supra, and Kern-Limerick, Inc. v. Scurlock, supra, clearly hold that such direct tax on a federal instrumentality or on the federal government is unconstitutional unless authorized by Congress. One distinction between sections 6381 and 6384 is that the former refers to tangible personal property generally and hence, may be removed by the United States for use by it outside the State of California, whereas section 6384 refers to tangible personal property which is used to improve real property within the boundaries of California and which will therefore presumably remain within the State of California. Sales and use taxes imposed upon the latter type of personal property would be permissible under authority ceded by Congress to the states under the "Buck Act" (4 U.S.C. Sec. 105), whereas the Legislature may have concluded that the former type of personal property apparently would not come within the scope of that congressional authorization.

Regardless of the legislative motivation, it is manifest that since section 6381 exempts from sales and use taxes all tangible personal property sold to the United States, section 6384 is an exception which imposes sales and use taxes on a certain type of personal property sold or resold to contractors under contract to the United States, to-wit, personal property "for use in the performance of contracts with the United States for the construction of improvements on or to real property in this state." The foregoing rationale is substantiated by Ruling 12,[13] adopted by appellant pur-

[13] Ruling No. 12 reads as follows:

"RULING No. 12 (Admin. Code 1922). United (cont'd)

suant to its authority under section 7051. Sections 122 and 123 of title 18 of the California Administrative Code read in part as follows:

13 (continued) States Contractors.

"References: Section 6384 and Section 9 of Chapter 681, Statutes of 1941.

"Either the sales tax or the use tax applies with respect to sales of tangible personal property (including materials, fixtures, supplies and equipment) to contractors or subcontractors for use in the performance of contracts with the United States for the construction of improvements on or to real property in this state. The fact that the contract may provide principally for the manufacture or acquisition of tangible personal property is immaterial. The sales tax, but not the use tax, applies even though the contractor purchases the property as the agent of the United States.

"Tax does not apply to sales of 'machinery and equipment' to contractors or subcontractors. As used herein, the term 'machinery and equipment' means property to which each of the following conditions applies: 1. It is not used by the contractor in making the improvements (as distinguished from supplies and tools, such as steam shovels, cranes, trucks, and hand or power tools, actually used to perform construction work). 2. It either is not attached to the realty or, if attached, is readily removable as a unit (as distinguished from 'fixtures'). (See below.) 3. It is installed for the purpose of performing a manufacturing operation or some other function not essential to the structure itself. 4. Title to the property passes to the United States before the contractor makes any use of it.

"Examples of 'Machinery and Equipment' are: Portable machines, equipment and tools; Furniture; Vehicles; Lathes, drills, presses, cranes, and other machines and apparatus which may be fastened to the realty but which can be removed without damage to the structure or without substantially impairing its use. (cont'd)

"122. Improvements. Improvements consist of buildings, structures, fixtures, and fences erected on or affixed to land; planted fruit and nut trees and vines that are taxable, other than date palms between four and eight years of age; and planted ornamental trees and vines. Where a substantial amount of materials other than land, such as concrete, is added to an excavation, both the excavation and the added materials are improvements, except that whenever the addition of other materials is solely for the drainage of land to render it arable or for the drainage or reinforcement of land to render it amenable to being built upon, the land, together with the added materials, remains land. In the case of property owned by a county, municipal corporation or a public district, fill that is added to taxable land is an improvement.

"123. Tangible Personal Property. All property that may be seen, weighed, measured, felt, or touched or which is in any other manner perceptible to the senses, except land and improvements, is tangible personal property."

It is manifest that by its rules and regulations appellant concedes that "Machinery and Equipment" sold to the United States is not subject to sales or use tax

---

13 (cont'd)

"'Fixtures", as distinguished from 'machinery and equipment', are things which are necessary to a structure and so firmly attached to the realty as to constitute a part of the structure. They are essential to the use of the building or other structure, and include such things as:

"Lighting fixtures; Plumbing fixtures; Furnaces, boilers and heating units; Air conditioning units; Refrigeration units; Cabinets, counters and lockers; Telephone switchboards and instruments; Elevators, hoists, and conveying units; Awnings and venetian blinds; Burglar alarm and fire alarm fixtures; Vault doors and equipment."

if it is not attached to realty, or if attached to realty, it is readily removable as a unit without damage to such real property, and is not a "fixture."

In its brief, appellant claims that the trial court committed error in classifying approximately 16 items covered by Exhibit 2 to the stipulation of facts as tax exempt. These items aggregate $11,499.42 in total taxes.[14] Findings VI, VII, VIII, X and XII described various items of property in general terms. For example, finding VI recites in part: "The items included in the above description which have been taxed by the Board are reinforcing steel, transformers, switch gear, distance markers and miscellaneous items. These items are found to be machinery and equipment. The tax measure of these items is $47,828.00. The amount of the assessment paid by Fedrick on the above items was $2,270.01, comprised of $1,913.12 in taxes and $356.89 interest."

It is impossible for us to correlate the claims of error by appellant with the findings by the court because of the general descriptive terms used by the trial court. Obviously, we cannot tell what is covered by the term "miscellaneous items." However, in any event, it is difficult for us to visualize how "reinforcing steel" if used in its ordinary sense could ever be classified as machinery and equipment. The term is normally used to refer to steel used to reinforce structural concrete. However, we have concluded that it is unnecessary for us to try to reconcile the court's findings with the parties' stipulation because it is manifest that despite the fact that the trial court did attempt to distinguish between personal property, which was machinery or equipment and therefore tax exempt under section 6381, and personal property used

[14] See supplemental page(s) following.

	Measure of Tax (Cost to Plaintiff	Tax	Interest to 6/30/67	Total
(a) Manholes consisting of cement, frames and covers and reinforcing steel	$ 16,736.00	$ 669.44	$ 125.14	$ 794.58
(b) Sand and gravel used as backfill, etc.	23,434.00	937.36	150.79	1,088.15
(c) Contractors consumable supplies	1,567.00	62.68	12.07	74.75
(d) Reinforcing steel and mesh placed in cement	1,493.00	59.72	13.11	72.83
(e) Reinforcing steel and mesh in substations	10,716.00	428.64	49.29	477.93
(f) Runway lights and bases	3,076.00	123.04	17.70	140.74
(g) Taxiway and parking area flood lights	2,176.00	87.04	17.66	104.70
(h) Transformer in night lighting vault	6,250.00	250.00	54.81	304.81
(i) Switch gear for night lighting vault	8,101.00	324.04	68.42	392.46
(j) Distance markers	1,286.00	51.44	9.68	61.12

	Measure of Tax (Cost to Plaintiff)	Tax	Interest to 6/30/67	Total
(k) Various parts for runway and other lights (embedded in cement)	$ 1,609.00	$ 64.36	$ 12.03	$ 76.39
(l) Transformer in night lighting vault	3,308.00	132.32	30.85	163.17
(m) Generator and switch gear	72,794.00	2,911.76	563.34	3,475.10
(n) Domestic water and sewer lines	74,936.00	2,997.44	458.34	3,455.78
(o) Storage tank for generator	1,932.00	77.28	17.00	94.28
(p) Various items not coded but determined to be parts of buildings and other structures (net of credit given for items of equipment purchased tax-paid)	15,706.00	628.24	94.39	722.63
Total	245,120.00	9,804.80	1,694.62	11,499.42 "

to improve real property, which was subject to tax under section 6384, it did commit error in reliance on Board policy based on a 1936 Attorney General opinion that personal property used in construction of an electrical transmission line should be classified as personal property not used to improve real property. As we have previously indicated, this Board policy and Attorney General opinion were held to be erroneous in King v. State Bd. of Equalization, supra, 22 Cal App 3d 1006. The Court of Appeal held that although the electrical transmission line installed in place was not subject to sale or use tax as an entity, the component parts used therein were personal property and subject to sales or use taxes. The court said (22 Cal App 3d at pp. 1011-1012): "... The statute interpreted by the Attorney General's 1936 opinion has no relevance here, because it is not imported into the scheme of sales taxation by any phase of the Sales and Use Tax Law. We have concluded that the present transaction is not a 'sale' within the meaning of section 6006; rather that it is vulnerable to the sales tax only to the extent established by the criteria for construction contracts generally. In view of that conclusion, the administrative interpretation of the sales tax act stemming from the Attorney General's 1936 property tax opinion is incorrect. The rule giving weight to contemporaneous administrative construction is not evoked when the construction is incorrect. (Atlantic Oil Co. v. County of Los Angeles (1968), 69 Cal 2d 585, 599 (72 Cal Rptr 886, 446 P 2d 1006).)"

With reference to construction contracts generally, the court said (22 Cal App 3d at pp. 1013-1014): "Rule 1521 defines a construction contract as one for creating a building or other structure on land, but not one for the sale and installation of machinery and equipment. It divides the personal property going into construction jobs into two categories: first materials, that

is, various kinds of tangible personal property which in combination lose their identity and become an integral part of the completed structure; second, fixtures, which become an accessory to the building and do not lose their identity when placed or installed. In effect, Rule 1521 classifies the contractor as a consumer of materials who must pay a sales tax on his purchases; classifies him as a retailer of fixtures, who must charge his customer a tax measured by the retail selling price which, in the case of a lump sum contract, is the cost price of the fixture to the contractor."

We have concluded that King v. State Bd. of Equalization, supra, is correct statement of law, and that the principles which it enunciates were not followed by the trial court here. It is manifest here that the trial court relied upon the Board policy and 1936 Attorney General opinion declared incorrect or inapplicable in the King case. It is likewise clear that the trial court applied the erroneous Board policy and Attorney General's opinion to all lines which transmitted electrical energy such as airport runway lights, including manholes constructed for use in connection with such runway lights, even though such improvements were not electrical transmission lines in the normally accepted sense of the term. Even though the findings characterize such improvements as "machinery and equipment," it is manifest that they were not machinery or equipment in the accepted sense of the words, but were personal property used for improvements of real property in this state and therefore taxable within the meaning of section 6384. Since such legally erroneous findings appear to be interwoven with all other findings, we cannot segregate them, and it is necessary to reverse the judgment in its entirety.

It is true that in 1965 the Legislature codified the Board policy and 1936 Attorney General's opinion in

section 6016.5, but such act was prospective in nature only (Stats. 1965, ch. 1960, Sec. 3) and does not apply to this case. (See King v. State Bd. of Equalization, supra, 22 Cal App 3d at p. 1009.)

What we have said above applies with equal force to appellant's counterclaim. Finding XIV, that the personal property therein referred to was all machinery and equipment, was likewise erroneous. Some items obviously were not. With proper findings the Board may well be entitled to judgment on its counterclaim and conceivably the Board may not be estopped to assert it. (See Market St. Ry. Co. v. Cal. St. Bd. of Equal., 137 Cal App 2d 87, 100-101 (290 P 2d 20).)

The trial court correctly concluded that the sale by Fedrick of certain equipment which the court found occurred in Arizona was not subject to California sales or use taxes. Although the evidence was sketchy, it was sufficient to support Finding XIII.

For the reasons stated hereinabove, the portion of the judgment appealed from is reversed.

Cobey, Acting P.J., and Allport, J., concurred.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

C.R. FEDRICK, INC., a corporation, Plaintiff	)	No. 921 001
v.	)	FINDINGS OF FACT
STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, Defendant	)	AND CONCLUSIONS OF LAW

This matter came on for trial on April 29, 1971, before the Honorable Jerry Pacht, Judge presiding, in Department 17 of the above entitled court. Plaintiff was represented by its counsel, Clyde R. Maxwell, and defendant was represented by its counsel, Evelle J. Younger, Attorney General, by Arthur B. Rosenfeld, Deputy Attorney General. The parties having filed a Stipulation of Facts in this Matter, and further evidence and testimony being produced by both parties, and the court having read and considered the stipulation, the evidence, the briefs and arguments of counsel, and the file and papers herein, the court hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I

C. R. Fedrick, Inc., hereinafter referred to as "Fedrick", is and was at all times relevant herein, a corporation organized and existing under the laws of California.

II

The State Board of Equalization of the State of California, hereinafter referred to as the "Board," is a duly authorized agency of the State of California,

charged with the administration and collection of the California Sales and Use Tax.

III

Fedrick is and was at all times relevant herein a "seller" duly permitted by the Board to engage in the sale of tangible personal property within the State of California, and did file California Sales and Use Tax Returns with the Board for all of the quarters between July 1, 1962, and September 30, 1965, as required by the Revenue and Taxation Code and applicable regulations of said Board.

IV

During the period July 1, 1962, through September 30, 1965, Fedrick entered into various construction contracts with the United States Government, an agency or agent of the United States Government or prime contractors to the United States Government principally for the purpose of furnishing and installing electrical and mechanical systems at Air Force and Naval Air Stations installations. Fedrick examined the items to be furnished and installed by it for the purpose of defining its liability for California sales and use tax, and determined that some items of personal property to be furnished and installed under the terms of the contract were sales of machinery and equipment or other personalty to the United States Government and exempt from sales and use tax under the applicable Revenue and Taxation Code statutes and regulations of the Board. Fedrick determined that other items of tangible personal property to be used in the performance of its contracts with the United States Government or agents of the United States Government were to be used for the construction of improvements on or to real property in California and taxable at the acquisition cost. Each of the items of tangible personal property purchased by Fedrick to be sold, used or installed pursuant to the

terms of the contracts were entered in Fedrick's records and coded, so that each item was identifiable as to its use on a particular job. In connection with the foregoing, certain items of tangible personal property were purchased by Fedrick with the tax being paid to the seller or vendor and other items were purchased with the tax excluded, the same being certified to the seller as a purchase for resale to the United States Government.

V

That subsequent to September 30, 1965, the Board caused an audit to be made of the accounts of Fedrick, and on March 1, 1966, the Board issued a Notice of Determination assessing additional sales and use taxes against Fedrick for the period of July 1, 1962, to September 30, 1965. The tax measure of the assessment was $1,074,593.00 and resulted in tax of $42,983.72 and interest thereon, $3,644.74, totaling $46,623.46. On May 11, 1967, the Board issued a Notice of Redetermination reducing the tax measure to $277,554.00 and reducing the tax to $11,102.16, and interest of $1,971.81, for a total assessment of $13,073.97. On June 9, 1967, Fedrick paid to the Board the amount of $13,129.48, representing the amount shown on the Notice of Redetermination, plus additional interest of $55.51. On July 6, 1967, Fedrick filed with the Board its Claim for Refund. By letter of August 14, 1967, the Board notified Fedrick that its Claim for Refund in the amount of $13,129.48 had been denied. Fedrick instituted the instant action in the Superior Court of the State of California for the County of Los Angeles on November 6, 1967. On July 9, 1970, the Superior Court of the State of California for the County of Los Angeles granted the Board's motion allowing it to amend its answer and file a counterclaim against Fedrick. Pursuant to the stipulation on file herein, plaintiff has conceded that tax had been proper-

ly assessed by defendant on various items with a tax measure of $19,017.00. The tax and interest on said amount was $440.62. Therefore, the amount of the assessment paid by Fedrick to the Board and here in issue is $12,688.86.

VI

At March Air Force Base, Riverside, California, plaintiff as a subcontractor to the prime contractor to the United States Corps of Engineers, furnished and installed certain electrical systems required for the operation of the instrument landing system including equipment, controls, connections, transformers, switches, circuit breakers, primary fuse cutouts, oil fuse cutouts, remote control oil switches and sectionalizing boxes.

The items included in the above description which have been taxed by the Board are reinforcing steel, transformers, switch gear, distance markers and miscellaneous items. These items are found to be machinery and equipment. The tax measure of these items is $47,828.00. The amount of the assessment paid by Fedrick on the above items was $2,270.01, comprised of $1,913.12 in taxes and $356.89 in interest.

VII

In the same capacity and in the same place, Fedrick furnished and installed a complete electrical duct system underground, including a 5,000-volt primary cable and wires, to be used as a communications and electrical distribution network; said system was comprised of a concrete encased duct system, manholes, handholes, series lighting cable system, cable marker tags and accessories, all as required by the United States Corps of Engineers' specifications.

The items included in the above description which have been taxed by the Board are manholes consisting of cement, frames and covers, and reinforcing steel, sand and gravel used as a base for the conduit and run-

way and taxiway lights and bases attached to manholes and handholes. These items are found to be integral parts of an electrical transmission line which during the period in issue was considered to be personal property by long-standing policy of the Board following the issuance of an opinion by the Attorney General in 1936. The tax measure of these items is $45,422.00. The amount of the assessment paid by Fedrick on the above items was $2,128.17, comprised of $1,816.88 in taxes and $311.29 in interest.

VIII

In the same capacity and in the same place, plaintiff furnished and installed a diesel electric generator complete with piping, fuel system, and various electrical connections required for same as required by its function as an alternate power source for the instrument landing system and other electrical systems at March Air Force Base, including the radar control consoles and equipment. The generator was connected to the lines for the operation of the electronic and visual aid facilities for the regulation of aircraft. The generator was to have sufficient capacity to maintain operational facilities at the March Field Facility in case of a failure or reduction of commercial power at March Air Force Base.

The items included in the above description which have been taxed by the Board are the diesel electric generator and switch gear, transformers and the underground storage tank for the generator. These items are found to be machinery and equipment. The tax measure of these items is $74,726.00. The amount of the assessment paid by Fedrick on the above items was $3,569.38, comprised of $2,989.04 in taxes and $580.34 in interest.

IX

Additional subcontracts were performed by Fedrick

for United States Government prime contractors or other subcontractors at the following installations: Siskiyou County Airport, Senator Wash Dam, Lawrence Radiation Laboratory, George Air Force Base, Hamilton Air Force Base, Alameda Naval Air Station, and the Naval Facility at Point Arguello. These contractors required Fedrick to perform similar work as was performed pursuant to the contracts at March Air Force Base.

X

The parties have stipulated and the court finds as a fact that an examination of all of the contracts between plaintiff and the United States Government indicate that there is considerable similarity between them with respect to the work to be performed by plaintiff; and these findings as to each classification of property at March Air Force Base with respect to whether a given item was properly included in the Board's assessment shall govern the status of similar items at other contract sites stated herein, excluding, however, installations made by plaintiff at Stanford University, which is the subject of a separate determination of the court herein and further excluding the items encompassed within the counterclaim of the defendant in this action, and further excluding items conceded by plaintiff to be taxable as stated above, and further excluding sale of capital equipment as hereinafter stated.

XI

Plaintiff contracted as a subcontractor with the prime contractor of an agency of the United States Government to furnish and install various items of property in connection with a linear accelerator installation to be located on real property owned by Stanford University and leased by the United States Government. It is found that the taxability of these items is not affected by the fact that they were installed in or on leased property. The items included in the above in-

stallation which have been taxed by the Board are piping and related items comprised of cement, reinforcing steel and back fill for sewer and water lines. The piping supplied fresh water for ordinary utilities and make-up water for the closed system used to cool the linear accelerator. Each of the above items is found to constitute an improvement to real property, since each item is not readily removable as a unit without substantially impairing the structure. The tax measure of these items is $75,577.00. The amount of the assessment paid by Fedrick on the above items was $3,023.08 in taxes and $434.03 in interest for a total of $3,457.11.

XII

Fedrick is entitled to a credit for certain items determined by the Board to be taxable and upon which tax had already been paid by Fedrick to its suppliers. These items are found to be machinery and equipment. The amount of the credit for the above items upon which tax had been paid and proper credit not given in the assessment is $5,334.00 resulting in tax of $213.36.

XIII

Included in the determination by the Board as part of the assessment against Fedrick was the amount of $24,984.00 which represented the tax measure of a retail sale of capital equipment by Fedrick to Action Equipment Company during the period in issue. Based upon the facts presented to the court, it is found that this sale occurred outside of the State of California. The amount of the assessment was $1,264.19, comprised of $999.36 in taxes, and $264.83 in interest.

XIV

On July 9, 1970, the Board filed an amended answer setting forth a purported counterclaim against Fed-

rick in the amount of $4,574.80 plus interest. The items making up said counterclaim included cement, frames and covers, reinforcing steel used in the construction of handholes and transverse light bars installed as approach lighting in the nature of visual glide-slope indicating systems at March Air Force Base and other job sites, which were the subject of plaintiff's complaint. The Board originally included these items as a part of a taxable assessment against Fedrick in an original Notice of Determination, but in the Notice of Redetermination which was the basis of the tax paid by Fedrick, the Board excluded such items from the assessment. Said items are found to be machinery and equipment installed by Fedrick.

XV

If any of the following Conclusions of Law be, or be adjudged to be, or constitute Findings of Fact, they are incorporated herein by reference as though they had been fully set forth as Findings of Fact.

CONCLUSIONS OF LAW

I

If any of the foregoing Findings of Fact be, or be adjudged to be, Conclusions of Law, they are incorporated herein by reference as though they had been fully set forth as Conclusions of Law.

II

All items furnished and installed by Fedrick found to be machinery and equipment are exempt from sales and use taxation pursuant to Revenue and Taxation Code section 6381 and the Board's Ruling No. 12. The amount of machinery and equipment included in the Board's assessment and paid by plaintiff and the amount of machinery and equipment for which Fedrick received no credit was $127,888.00. Therefore, Fedrick is en-

titled to a refund of $5,115.52 tax, $937.23 interest, for a total of $6,052.75, with interest accruing at the rate of 6% per annum on said amount from June 9, 1967.

III

All items furnished and installed by Fedrick found to be integral parts of an electrical transmission line are personal property and exempt from sales and use taxation pursuant to section 6381 of the Revenue and Taxation Code. The tax measure of these items included in the Board's assessment was $45,422.00. Therefore, Fedrick is entitled to a refund of $1,816.88 tax, $311.29 interest, for a total of $2,128.17 with interest accruing at the rate of 6% per annum on said amount from June 9, 1967.

IV

All items found to be improvements to real property were taxable under the sales and use tax laws pursuant to sections 6007.5 and 6384 of the Revenue and Taxation Code and the Board's Ruling No. 12. The amount of these items constituting improvements to real property included in the assessment was $75,577.00, resulting in tax of $3,023.08 and interest of $434.03 for a total of $3,457.11. Fedrick is not entitled to a refund of this amount.

V

The sale of capital equipment by Fedrick to Action Equipment Company constituted a sale of tangible personal property outside of the State of California. Such sales are not subject to sales or use tax in California. The amount of said sale was $24,984.00. Fedrick is entitled to a refund of $999.36 tax, and $264.83 interest for a total of $1,264.19 with interest accruing at the rate of 6% per annum on said amount from June 9, 1967.

VI

The counterclaim contained in the Amended Answer filed by the Board on July 9, 1970, in the amount of $4,574.80, plus interest was an improper assertion by the Board of a tax and the Board shall take nothing by said counterclaim.

VII

Fedrick shall have its costs.

VIII

Let judgment be entered accordingly.

Dated: 5 Jan 1971.

s/
JERRY PACHT,
Judge, Los Angeles Superior Court

TITLE 18 CALIFORNIA ADMINISTRATIVE CODE, SECTION 1521, formerly known as RULE 11.

(Para. 60-112) Reg. 1521. Construction Contractors.-- (a) Definitions: (1) The term "contractor" as used herein includes both general contractors and subcontractors and includes contractors engaged in such building trades as carpentry, bricklaying, cement work, steel work, plastering, sheet metal work, roofing, tile and terrazzo work, electrical work, plumbing, heating, air conditioning, painting and interior decorating.

(2) The term "construction contract" as used herein means a contract for erecting, remodeling or repairing a building or other structures on land and includes lump sum, cost-plus, and time-and-material contracts. The term "construction contract" does not include a contract for the sale and installation of machinery or equipment.

(3) The term "materials" as used herein means tangible personal property which when combined with other tangible personal property loses its identity to become an integral and inseparable part of the completed structure. "Materials" includes such things as:

Bricks
Builders' hardware
Calking material
Cement
Conduit
Electric wiring and connections
Flooring
Glass
Gravel
Insulation
Lath
Lead
Lime
Lumber
Macadam
Millwork
Mortar
Oil
Paint
Paper
Piping, valves and pipe fittings
Plaster
Putty
Reinforcing mesh
Roofing
Sand
Sheet metal
Steel
Stone
Stucco
Tile
Wall Board
Wall Coping
Wall paper
Weather stripping
Wire netting and screen
Wood preserver

(4) The term "fixtures" as used herein means things which are accessory to a building and which do not lose their identity as accessories when placed or installed. "Fixtures" includes such things as:

Lighting fixtures
Plumbing fixtures
Furnaces, boilers and heating units
Air conditioning units
Refrigeration units
Telephone switchboards and instruments
Elevators, hoists, and conveying units
Awnings and venetian blinds
Burglar alarm and fire alarm fixtures
Vault doors and equipment
Cabinets, counters and lockers (prefabricated)
Signs

(b) Materials Used by Contractors: (1) Contractors are the consumers of materials used by them in fulfilling construction contracts and the tax applies to the sale of such materials to the contractors.

(2) If, however, in the case of a time-and-material contract the contractor bills his customer an amount for "sales tax" computed upon his marked-up billing for materials, it will be assumed, in the absence of convincing evidence to the contrary, that he regards himself as selling the material so billed, and tax will apply to the amount of the billing for materials.

(c) Fixtures Furnished and Installed by Contractors: Contractors are retailers of "fixtures" which they furnish and install and tax applies to the retail selling price thereof; which, in the case of lump-sum construction contracts, is regarded as the cost price of the fixtures to the contractors. If the contractor is the manufacturer of the fixtures, the retail selling price thereof is the prevailing price at which similar fixtures in similar quantities ready for installation would be

sold to contractors.

(d) Other Sales by Contractors: Tax applies to all retail sales by contractors, including the furnishing and installation of fixtures (see above), over-the-counter sales, and "jobbing sales." "Jobbing sales" are repair and replacement jobs in which the materials and fixtures are billed at retail.

(e) Supplies and Tools: Contractors are the consumers of supplies such as oxygen, acetylene, gasoline, acid, thread-cutting oil, and tools and parts for tools, which they use in their business, and the tax applies to the sale of such supplies and tools to contractors.

(f) Resale Certificates and Deductions for "Tax-Paid Purchases Resold": Contractors regularly making retail sales and holding valid seller's permits may purchase "materials" and "fixtures" ex-tax under resale certificates (see Reg. 1668). They may not purchase supplies and tools under resale certificates unless they are actually engaged in the business of selling such property without previously using it. If a contractor makes sales without prior use of any tangible personal property purchased with sales tax or use tax paid on the purchase price, he can obtain credit for the tax so paid by taking a deduction on account of "tax-paid purchases resold" (see Reg. 1701).

Any person who gives a resale certificate and wilfully fails to make proper reports with respect to tangible personal property purchased under such a certificate is subject to the maximum penalties prescribed by law.

(g) Transmission and Distribution Lines: Persons engaged in the erection, installation or repair of telephone and telegraph lines, electrical transmission and distribution lines, and the poles, towers or conduits by which they are supported or in which they are contained are construction contractors improving real property within the meaning of paragraph (a) of this regulation.

TITLE 18 CALIFORNIA ADMINISTRATIVE CODE, SECTION 1615, formerly known as RULE 12

(Para. 60-168) Reg. 1615. United States Contractors. -- Either the sales tax or the use tax applies with respect to sales of tangible personal property (including materials, fixtures, supplies and equipment) to contractors or subcontractors for use in the performance of contracts with the United States for the construction of improvements on or to real property in this state. The fact that the contract may provide principally for the manufacture or acquisition of tangible personal property is immaterial. The sales tax, but not the use tax, applies even though the contractor purchases the property as the agent of the United States.

Tax does not apply to sales of "machinery and equipment" to contractors or subcontractors. As used herein, the term "machinery and equipment" means property to which each of the following conditions applies:

1. It is not used by the contractor in making the improvements (as distinguished from supplies and tools, such as steam shovels, cranes, trucks, and hand or power tools, actually used to perform construction work).

2. It is either not attached to the realty or, if attached, is readily removable as a unit (as distinguished from "fixtures," see below).

3. It is installed for the purpose of performing a manufacturing operation or some other function not essential to the structure itself.

4. Title to the property passes to the United States before the contractor makes any use of it.

Examples of "Machinery and Equipment" are:

Portable machines, equipment and tools
Furniture
Vehicles
Lathes, drills, presses, cranes, and other machines and apparatus which may be fastened to the realty but which can be removed without damage to the structure or without substantially impairing its use.

"Fixtures," as distinguished from "machinery and equipment", are things which are necessary to a structure and so firmly attached to the realty as to constitute a part of the structure. They are essential to the use of the building or other structure, and include such things as:

Lighting fixtures
Plumbing fixtures
Furnaces, boilers and heating units
Air conditioning units
Refrigeration units
Cabinets, counters and lockers
Telephone switchboards and instruments
Elevators, hoists, and conveying units
Awnings and venetian blinds
Burglar alarm and fire alarm fixtures
Vault doors and equipment

APPENDIX II
DESCRIPTION OF ITEMS IN CONTROVERSY

All of the items in question, including without limitation, manholes, handholes and underground cement transmission lines were easily removable without damage to the realty, and as above stated, were unrelated to any structure. In fact, a similar but less extensive system or pertinent parts thereof was removed by Fedrick before installing the system in controversy. (Testimony of Mr. Fedrick, R.T. p. 88 l.17 to pg. 89 l.10.)

Descriptions of the taxable items in question and the functions thereof will be found in the testimony of Mr. Fedrick, sole stockholder of Petitioner, appearing at pages 64 - 122 of the Reporter's Transcript, and particularly as follows:

1. Manholes. A concrete encased hole in the ground 4'x4'x4' or larger, used as a termination point in order to facilitate cable pulling. Used in pulling electric cables or wires through ducts, and in order to make connections. (R.T. p. 66 l.1 to p. 67 l.4.)

2. Duct line. A concrete transmission line encasing fiber duct or asbestos duct installed below ground. (R.T. p. 67 ll. 2-26).

3. Manhole covers. Cement covers for manholes. (R.T. p. 69 ll. 9 - 20).

4. Handholes. A small version of Manholes, when smaller ducts containing fewer cables are used. It is a termination point also, used in pulling electric cables or wires through ducts and in order to make connections. (R.T. l. 69 l. 28 - p. 70 l.26).

5. Electrical Distribution System - Air Field Installations. Every 200 feet along side the runway there is a light to light up the runway, and that is true

also of the taxiway. On each end of the runway is a complete row of lights so that the person landing an airplane will be able to designate the end of the strips. These are green in color. The ones on the side are of an amber color. The approach lights are of a red color and the stroboscopic approach lights which are a real white flashing beacon kind of light to guide the approaching pilots coming in for landings and it extends about 3,000 feet beyond the end of the field, for the approach lighting and the stroboscopic lighting. In order to reach all these lights, a transmission line is installed into or around the runway for that purpose. The lights have a break-off coupling so that if struck by an airplane they will break away without damaging the plane. The Petitioner strung lines and cables out to the strobe lights and the lights which were out past the end of the field, laid the cables and put the wires in them. Duct lines encased in concrete are installed for about 1,000 feet before reaching the runway and beyond that the lines are put in a direct burial duct which is not encased in concrete, but is simply installed by putting sand and gravel backfill in a trench in which the cables are laid. (R.T. p. 71 line 27 to p. 75 line 3).

6. Regulator (Transformer). A device to reduce voltage from high voltage to roughly 110 volts, going from a series circuit to a parallel circuit similar to the voltage that is used in the home, and then the current goes from the regulator or transformer to the runway lights. Transformers are located in the handholes and regulators are located in the night lighting vault to which Petitioner made an addition. Transformers and regulators perform the function of managing the electricity by changing the characteristics of it to make it usable for the particular purposes for which the current is needed. (R.T. p. 77 line 6 to p. 80 line 10).

7. Distance Markers. A triangular-shaped marker which is lighted on the inside and the purpose of it is to indicate how many remaining feet of runway there are beyond the marker, and the light is connected by cable or wire to some transmission. It also has a break-off, so that if struck by a plane, it would break away easily. (R.T. p. 80 line 11 to p. 81 line 5).

8. Parts for Runway and Other Lights Embedded in Cement. This is a steel base or a steel can that is embedded in concrete for handholes as shown in Exhibit 19 (R.T. p. 81 line 6 to p. 82 line 5).

9. Generator Switch Gear. This is an electric power generator for standby use in the event that there is a failure on the main power lines. It has an automatic transfer switch that starts the generator so that the runway lights will continue in the event of a power failure, and it is not used for anything unless the power fails. (R.T. p. 82 line 6 to p. 83 line 17).

10. Diesel Fuel Storage Tank. This is a tank for the storage of diesel fuel used to operate the generator and switching gear. All is located in the addition that the Petitioner built onto the nightlighting vault, which houses the generator, storage tank, etc. (R.T. p. 83 line 27 to p. 84 line 20).

11. Addition to Night Lighting Vault. This addition is built by Petitioner onto the night lighting vault to house the generator and control panels, transfer switch, piping for diesel fuel, cooling system and related items. (R.T. p. 84 line 7 to p. 85 line 26).

Exhibits 1 to 21, inclusive, are photographs of the various items in question and are described at pages 2 to 7 of the Transcript as follows:

Exhibit No.	Description
1	Visual approach lights, visual glide slope and approach bars used for locating the threshold of the runway
2	Handhole located alongside of the runway showing one empty and one filled duct for electrical high voltage wiring
3	Generator installation, including control panels
4	Taxiway light and handhole cover
5	3 sections of approach lighting; the red box in the center the stroboscopic beacon light operated by condenser discharge
6	Backside of the building housing the generator showing air compressor after cooler and cooler for the generator
7	Another photograph of the approach lighting with the strobe beacon shown in the center
8	Crossbar threshold lighting with strobe lighting in the center
9	Runway distance marker
10	Installation of the regulators for high intensity runway lighting
11	A portion of the runway and five on the board in the lower right section of the photograph, which is one of the distance markers and shows that there is 5,000 feet of runway left
12	Control panel used as an alternate to that in the control towers, which permits the operator to regulate the intensity of the

lighting on the runway for the purpose of increasing the illumination in low visibility weather

13 Installation in the night lighting showing more regulators, some of which were installed by Petitioner under the project in question

14 Handhole located alongside the runway showing one empty and one filled duct for electrical high voltage wiring

15 & 16 Photographs of approach lighting with the strobe beacon shown in the center

17 Another view of the same handhole shown in the previous exhibit

18 Runway light installation typical of all projects

19 Closeup view of runway light installation, typical of all projects

20 Unit transformer installation typical of 3 unit substations

21 Alert hanger installation

As appears from the foregoing descriptions and from the photographs, none of the items in question relating to airfield lighting were any part of the runway. They were separate from the runway and were periodically replaced.

APPENDIX III

(From Reporter's Transcript, pages 382 to 395)

.... position, as lawyers often do. I am still left with the same burden, should it be taxable, and I am beginning to think now that what has gone on in the past is only going to give me the broadest kind of guide lines, and what you gentlemen are going to wind up with is how I happen to feel about this matter, based upon the persuasiveness of what you have offered me, and I think I could take either position and decide that the evidence was more persuasive in that regard.

I am satisfied that that is the state of the record, but the more we go on, and the more evidence we take, the more I am going to find that it is whatever this Judge believes is right and fair, and kind of Solomonistic, which I frankly would like to be relieved of.

Q BY MR. MAXWELL: Mr. Paulson, you gave us, as your opinion, the generator at March Air Force Base would not be tax exempt; is that right?

A Not at March Air Force Base, correct.

Q Now, that same generator, installed elsewhere, on or for the United States Government, could be exempt or not, depending upon the character of the use?

A That's correct.

Q Your opinion there is based upon Ruling 12?

A That's correct.

Q And Ruling 12 is a regulation of the Board of Equalization, duly published and so on; is it not?

A So I understand.

Q What does it provide, as a general matter,

sir? I think you are more of an expert in this particular matter than I am.

A It provides generally that sales to contractors are tangible personal property used to construct improvements to real property, for the Federal Government are taxable sales, and then it carves out an exception from this broad generality and defines this as machinery and equipment, with respect to which four conditions have to be met for exception, which were explained in some detail by Mr. Stetson.

Q All right. This ruling is based upon what statute?

A The statutory authority for the taxability is Section 6384 of the Revenue and Taxation Code.

Q What is the statutory provision for the exemption in machinery and equipment?

A Section 6381 would be the only possible statutory authority.

Q And that particular statute provides that sales of tangible personal property to the United States Government are exempt from tax?

A That is correct.

Q It doesn't say anything about the use to which that property is put, does it?

A It does not.

Q It makes no distinction between sales of tangible personal property, which is then used to improve the realty by the Government or --

A No. Section 6384 takes care of that.

Q And that concerns construction contractors; does it not?

A Well, it concerns a little more than that, because it concerns Section 6381. It says notwithstanding any provision of the law. Then it goes on to provide with how the tax applies.

Q Yes. Now, doesn't Rule 12 relate to construction contractors only?

A I think it does.

Q Does Rule 12 define construction contractors?

A Let me -- my memory is not that precise. I know it is defined in Rule 11. Let me check the statute or the rule. I find I get in trouble if I remember too much.

Q By the way, before you answer the question, may I inquire what that book is to which you are referring?

A This is a California Tax Service, published by California Tax Service, Berkeley, California, copyrighted 1971 -- just pick a page -- Vaughn T. Ellsworth.

Q Thank you.

A The term contractor section, construction contractor, neither is defined in this.

Q For a definition of construction contractor, we would have to go to Ruling 11, would we not?

A I would say generally. I don't believe that Ruling 11 is binding on Ruling 12, however, because they are separate regulations.

Q Ruling 11 does define construction contractor?

A That is correct, it does.

Q And would a construction contractor, under Ruling 11, who is installing machinery and equipment, be a construction contractor?

A Well, your question answers itself, because a construction contractor would be a construction contractor forever, but if a construction -- it would not be a construction contract.

Q It would not be a construction contract?

A Under Ruling 11.

Q Are you familiar, Mr. Paulson, with the concept of trade fixtures?

A Yes, to a degree, I have read substantially about trade fixtures.

Q As a matter of fact, there is a case called the Standard Oil Company case that we refer to frequently in connection with trade fixtures?

A I have read the case.

Q You are familiar with that. You are also familiar with the General Electric case?

A Well, I assume --

MR. ROSENFELD: Your Honor, I believe if counsel is going to cite cases, he should give a few citations. The General Electric case -- there are probably thousands of General Electric cases. Let's zero in on this a little.

MR. MAXWELL: Well, counsel knows the case to which I am referring. Mr. Paulson knows the case to which I am referring.

THE COURT: It is in somebody's brief, isn't it, gentlemen?

MR. ROSENFELD: Yes, I think I mentioned it.

MR. MAXWELL: Certainly.

THE COURT: Just as long as we are all talking about the same authority.

THE WITNESS: If you are referring to the case involving the installation of a generator, I am familiar with it.

Q BY MR. MAXWELL: Yes, and in that case, the generator was, I think, sold to a private company, and even though it weighed many many tons, the Supreme Court held that it was a sale?

A That's correct.

Q And it was taxed upon the full price of the sale and installation of the generator; is that right?

A When you say the installation, as I recall the facts surrounding that case, some $36,000.00 were deleted from the measure as installation.

Q And the remainder of the contract price was?

A I can't testify to that, because I have not looked at the audit and the amounts actually involved.

Q Now, was there any difference in the generator in the General Electric case, and the generator in the March Air Force Base referred to here?

MR. ROSENFELD: Objection, we don't know what the generator was. All we know, from reading the opinion, the court describes a generator. There can be many differences.

THE COURT: The objection will be sustained, unless the witness happens to know about that generator.

THE WITNESS: I don't happen to know about the generator, but I --

THE COURT: All right. The sense of Mr. Max-

well's question will be how do you distinguish the two situations, Mr. Paulson.

THE WITNESS: Shall I answer you, Judge?

THE COURT: Yes.

THE WITNESS: The generator at March Air Force Base is controlled, in my opinion, by statute under Ruling 12, whereas the generator in the General Electric case is controlled by Ruling 11.

THE COURT: And why?

THE WITNESS: By virtue of Section 6384, the tax is on the sale to the contractor on improvements, whereas under Ruling 11, they have distinguished from the tax point between what is defined as materials in Ruling 11, and what is defined as fixtures in Ruling 11.

The sale to the contractor of materials, under Ruling 11, is the taxable event, whereas the sale by the contractor of fixtures under Ruling 11 is a taxable transaction, which was the holding in the General Electric case. Where you go to 6384, you have no distinction, so if it becomes an improvement, which a fixture would be, then the sale to the contractor, whether it be material or fixtures, would be taxable. So you have a different -- a possibility of a different nature.

THE COURT: Do I understand that you distinguish the generator in the March Field situation, and the generator in the G E case by a use test, or is there some other consideration? I may not have understood your answer, sir.

THE WITNESS: If the -- if we had a non-Government contract at March Field, for instance, if there was a contract with the City of Los Angeles, we would have taxed Mr. Fedrick on the sale of the generator to the City of Los Angeles, and had he purchased that genera-

tor in a fabricated condition, which I am sure he did, and he installed it pursuant to a lump sum construction contract, the tax measure would have been exactly the same as it is in the March Air Force - or March Field taxation problem.

THE COURT: Well, when G E bought it -- or sold its generator, how was it different?

THE WITNESS: The main difference in the General Electric case is that General Electric manufactured its generator from raw materials which it purchased, and in order to get the measure of tax included in the measure of tax at the manufacturing cost, this was held to be a fixture, and this measure was included more than just his cost of materials. Had General Electric purchased them, generators, for instance, from Westinghouse, which would be unlikely, then we would have taxed it on its purchase price.

MR. ROSENFELD: Your Honor, may I be heard. I have submitted a trial brief, and I think that perhaps Mr. Maxwell is leading the Court astray, because I have a feeling with all due deference to the Court --

MR. MAXWELL: I resent that implication, your Honor.

THE COURT: It is easily done in this case, I will tell you, gentlemen. Go ahead.

MR. ROSENFELD: -- that you are not familiar with this particular area of the law, but the General Electric case, as Mr. Paulson has mentioned, refers to one specific set of facts.

Now, we are talking here about Government contracts. We are not talking about a regulation. We are talking about a statute, 6384, that says, "notwithstanding any other provisions".

Now, I have pointed out in my brief if a

generator, for instance, is put on an installation of the United States Government, it is not important whether it is a sale or not. The important thing is what happens to that generator if it becomes --

THE COURT: That is what I thought we had started -- go ahead.

MR. ROSENFELD: Now, in the General Electric case, was it a sale or not, is not the important thing in this particular case. We are talking about 6384 --

THE COURT: As I understand, what is important is what this generator was used for and whether it is part of the overall transmission of power; you would concede that?

MR. ROSENFELD: Yes, your Honor, in fact, if you read the General Electric case, you will see that Justice Peters -- this was not a Supreme Court case, by the way, it was an Appellate Court case -- Justice Peters distinguishes Ruling 11 and Ruling 12.

Of course, counsel hasn't bothered to point that out, but there is a difference, and I think that with all due respect to Mr. Maxwell, that he is leading the Court astray.

MR. MAXWELL: Your Honor, I am trying to cross examine a witness who has given as his opinion --

THE COURT: I understand.

MR. MAXWELL: I am trying to elicit answers from him. In so doing, I have not requested any testimony from Mr. Rosenfeld, and I ask that his remarks be stricken.

THE COURT: Remarks of counsel are not going to be determinative, gentlemen. We will just consider that we heard a little argument ahead of time, that's all. Go ahead with your cross examination.

MR. MAXWELL: Well, I resent further the thought that I am trying to mislead the Court. I am certainly not trying to do anything of the sort.

THE COURT: The characterization by counsel was unfortunate, but it did not register in any material way with the Court.

MR. ROSENFELD: I apologize.

THE COURT: I don't think any of you ntlemen are trying to mislead anybody. You are goi..g to emphasize those factors which you feel will aid the Court in seeing the matter your way, and that is what you are paid to do. So go ahead.

Q BY MR. MAXWELL: Mr. Paulson, what I am trying to get at is this same generator, as you say, if Mr. Fedrick installed it for the City of Los Angeles, that would have been regarded as a sale of tangible personal property to the City of Los Angeles and taxed at the retail price thereof; is that correct?

A Well, that -- let me qualify that slightly, because as I mentioned, if we had a lump sum of construction contract -- is this what you are referring to, a lump sum construction contract?

Q I am referring to an installation of a generator, the same as at March Air Force Base, except it is done for the City of Los Angeles.

A I haven't seen the March Air Force Base contract, but I will assume it is a lump sum construction contract. If that is the case, then the cost price in quotes, as used in Ruling 11, would be the measure of tax which would be what Mr. Fedrick paid for the generator, which would be exactly the same as he did in March Air Force Base.

Q So that the tax then would be on the seller,

which would be Mr. Fedrick, at his cost for that generator; is that right?

A If he purchased it tax paid it would be on his supplier, but he would get a tax paid credit, so that there would be no tax, but if he didn't, then it would be on him as retail.

Q Then it would be on him at his cost price?

A That is correct.

Q And that then would be regarded as a sale of tangible personal property to the City of Los Angeles?

A That is correct.

Q Now, when the same contractor, under the same circumstances, sells the same item of tangible personal property to the United States Government, that is not regarded as a sale; is that correct?

A No, that is not correct. The way you pose your question, if he sells an item of tangible personal property to the Government, it is his sale, and it is exempt.

Q So if he installed the same generator in the same way for the Air Force, there would be no tax on that sale is what you are saying; is that right?

A No. I didn't say that.

Q What did you say?

A I responded to your earlier question, which was if he sold it, if the sale to Mr. Fedrick by a supplier was to be used in the construction of an improvement on real property, the sale to him would be a taxable incident, under a Government contract.

Q So that the difference is not in the item that was sold, but in the use thereof?

A In this instance.

Q Is that what you are saying?

A That's correct.

Q Now, actually, if this had been sold to the Air Force to run a lathe, you are telling me that this use of the generator would have made it exempt, and a non-taxable transaction?

A That's right, as long as we are referring to the same generator, becuase it meets the removability tax.

I might also add that there are two other tests, but they have not become the subject of discussion here, which I am sure they aren't in issue.

THE COURT: Let's take our morning recess now.

(RECESS)

THE COURT: Let's proceed, gentlemen.

Q BY MR. MAXWELL: Mr. Paulson, we were discussing the installation of a generator, and basically, we said that if that generator was sold to the State or City of Los Angeles, that it would be considered as a taxable sale, I believe you said, at the cost to the installer. If he purchased it from somewhere else, or if he built it, why then it would be taxable at his cost plus the fabrication labor that went into it; isn't that right?

A It would be a higher measure, yes.

Q So that would not depend on use to which that generator was put?

A For non-Government purchaser, correct.

Q When we say non-Government, then we mean the State and the City as well as --

A Well, non -- yes, U. S. Government.

Q As well as a private purchase?

THE COURT: The witness said non-U.S. Government.

Q BY MR. MAXWELL: But installing it in the same fashion for the United States Government would subject it to tax if it were used for the purpose of improving realty?

A Correct.

THE COURT: Well, if something is used for the purpose of improving realty, it may have the effect of improving realty. They didn't stick that generator in there to make the building better. They stuck it in there to be a supplemental power source in case the lights went out; isn't that what happened here?

THE WITNESS: That is correct.

THE COURT: Why, in the name of heaven, is it an improvement to real property? It just flies in the face of all logic if we are going to adopt this fiction that the Government has said if you sell to the U.S. Government, it is part of the power transmission, it will be exempt, because we think this is wholly with the transmission of electrical power. Why should we take, on the other hand, and say that has nothing to do with the electrical power, it is a piece of the realty, just because it is stuck there and weighs a lot? I don't follow that.

MR. MAXWELL: Let me point out one other thing with respect to this.

Q BY MR. MAXWELL: Mr. Paulson, if you put the generator in place, and you hook it up to the building lights, under your -- under the Board's rulings, my understanding is that becomes an improvement to realty

then; is that right?

A That is correct.

Q You hook it up to the lights and it is personal property?

A Correct.

Q And the sale would be exempt; is that correct?

A That is correct.

THE COURT: Now, I realize -- and forgive me for sounding off in such a vigorous fashion -- Mr. Paulson, that you have to make these rulings based on laws which somebody else writes, and you have got to interpret, and I am in the same fix here. I am trying to find some logical way to find out how these matters should be classified, and up to now I am left in the dark, so far as logic is concerned. I just hate to give a gut decision on this matter, if I could find a better way to do it, gentlemen.

Anything further from this witness?

MR. MAXWELL: Yes, sir.

Q BY MR. MAXWELL: The manholes, I believe you said, in your opinion, have always been considered to be taxable, is that right, so far as you know, in the operation of a transmission line?

A Well, it was my opinion, and I didn't have any precedent to the contrary, so I concluded that they were improvements.

Q And the parts or the line in between the ...

APPENDIX IV

PERTINENT SECTIONS FROM THE REVENUE AND TAXATION CODE

Sec. 6052. Collection by retailer from consumer.

The tax hereby imposed shall be collected by the retailer from the consumer in so far as it can be done.

Sec. 6052.5. Sales tax reimbursement schedule.

Text of section operative until April 1, 1974.

The board shall prepare sales tax reimbursement schedules showing the total amount that may be collected by the retailer from a consumer in reimbursement of the sales tax, computed on each sales price, from one cent ($0.01) to and including one hundred dollars ($100) at the 3 3/4-percent rate, at the 4-percent rate, at the 4 3/4-percent rate, at the 5-percent rate, at the 4 1/4 percent rate, at the 5 1/2 percent rate, and at any other combined rates of state, local and transit district taxes administered by the board. The schedules shall be identical with the following tables up to the amounts specified therein:

3 3/4 percent

Price	Tax
.01-.12	.00
.13-.37	.01
.38-.64	.02
.65-.93	.03

4 per cent

Price	Tax
.01-.12	.00
.13-.34	.01
.35-.59	.02
.60-.87	.03

4 1/4 percent

Price	Tax
.01-.11	.00
.12-.32	.01
.33-.56	.02
.57-.82	.03

5 percent

Price	Tax
.01-.10	.00
.11-.27	.01
.28-.47	.02
.48-.68	.03
.69-.89	.04
.90-1.09	.05

5 1/4 percent		5 1/2 percent	
Price	Tax	Price	Tax
.01- .10	.00	.01- .10	.00
.11- .26	.01	.11- .25	.01
.27- .45	.02	.26- .45	.02
.46- .65	.03	.46- .62	.03
.66- .84	.04	.63- .79	.04
.85-1.03	.05	.80- .97	.05
1.04-1.20	.06	.98-1.15	.06

The remainder of the schedules at the 3 3/4 percent rate, at the 4-percent rate, at the 4 3/4 percent rate, at the 5-percent rate, at the 5 1/4-percent rate, and at the 5 1/2 percent rate shall show amounts of reimbursement computed by applying the applicable tax rate to the sales price, rounded off to the nearest cent by eliminating any fraction less than one-half cent and increasing any fraction of one-half cent or over to the next higher cent.

The "sales tax reimbursement schedule" shall be available for inspection and duplication or reproduction.

Each retailer who collects amounts from a consumer in reimbursement of the sales tax shall use the appropriate schedule prepared by the board in computing the amount of the reimbursement, based upon the sales price of the item sold where one item is sold, and where more than one item is sold in any one transaction, upon the sum of the aggregate sales prices of the items sold, or he shall include in the sales price of each item an amount of reimbursement computed to the nearest mill at the applicable tax rate and post a notice in his premises stating that each posted or advertised price includes reimbursement so computed. When both taxable and nontaxable items are included in the same transaction, the foregoing requirement regarding computation of tax reimbursement upon the sum of the aggregate

sales prices shall apply only if the purchaser requests at the time of the sale that the computation be made in this way.

The board shall enforce the provisions of this section.

This section shall remain in effect only until April 1, 1974, and as of such date is repealed, unless a later enacted statute, which is chaptered before that date, deletes or extends such date.

Sec. 6053. Advertising or holding out that tax will be assumed, absorbed or refunded; offense.

It is unlawful for any retailer to advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax or any part thereof will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold or that if added it or any part thereof will be refunded. Any person violating any provision of this section is guilty of a misdemeanor.

Sec. 6054. Separate statement of price and tax.

The board may by regulation provide that the amount collected by the retailer from the consumer in reimbursement of the tax be displayed separately from the list price, the price advertised in the premises, the marked price, or other price on the sales check or other proof of sale.

Sec. 6054.5. Erroneous collection of tax reimbursement.

(a) When an amount represented by a person to a customer as constituting reimbursement for taxes due under this part is computed upon an amount that is not taxable or is in excess of the taxable amount and is actually paid by the customer to the person, the amount

so paid shall be returned by the person to the customer upon notification by the Board of Equalization or by the customer that such excess has been ascertained. In the event of his failure or refusal to do so, the amount so paid, if knowingly computed by the person upon an amount that is not taxable or is in excess of the taxable amount, shall constitute an obligation due from him to this state.

(b) When transactions occur during any period for which a return is required to be filed and the total of the amounts represented by a person to his customers as constituting reimbursement for taxes due under this part with respect to those transactions exceed the taxes due from the person measured by his gross receipts during that period, the excess, if paid by and not returned to his customers, shall constitute an obligation due from the person to this state. The provisions of this subdivision shall apply when the amounts are mistakenly and not knowingly computed upon amounts that are not taxable or are in excess of the taxable amounts.

(c) The obligations specified in subdivisions (a) and (b) may be determined and collected by the board in accordance with Chapters 5 and 6 of this part. The amount so collected shall be refunded by the board to the person in accordance with Chapter 7 of this part, only upon submission of proof to the satisfaction of the board, or in the event the board denies his claim for refund, to the satisfaction of the superior court, that such amount has been returned or will be returned to his customers.

(d) The foregoing shall not apply to an amount computed by using a schedule designed to result in reimbursement in an amount as nearly equivalent as practicable to the tax applicable to total taxable sales and to the average amount of individual taxable sales.

PROOF OF SERVICE

State of California)ss
County of Riverside)

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of 18 years and not a party to the within entitled action; my business address is 1509 N. Main, Santa Ana, California.

On September 20, 1974, I served the within PETITION FOR A WRIT OF CERTIORARI on the interested parties in said action, by placing three (3) true copies in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed to:

Philip C. Griffin
Office of the Attorney General
600 State Building, 217 W. First St.
Los Angeles, California 90012

I CERTIFY under penalty of perjury that the foregoing is true and correct. Executed on September 20, 1974, at Santa Ana, California.

JACK GALLAGHER

Supreme Court of the United States

October Term, 1974
No. A-1295

C. R. FEDRICK, INC., a corporation,
Petitioner,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Respondent.

RESPONDENT'S OPPOSING BRIEF

EVELLE J. YOUNGER,
Attorney General,
By PHILIP C. GRIFFIN,
Deputy Attorney General,
3580 Wilshire Boulevard,
Suite 800,
Los Angeles, Calif. 90010,
(213) 620-3175,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Questions as Presented by Petitioner 5

Argument 6

I

Petitioner Is Precluded From Raising Constitutional Questions Not Properly Raised in the California Courts 6

II

Sections 6384 and 6007.5 of the California Revenue and Taxation Code and Sections 1521 and 1615 of the California Administrative Code Are Valid and Do Not Constitute an Invidious Discrimination Against the Federal Government and Its Contractors 8

III

Revenue and Taxation Code Section 6384 Does Not Violate the Sovereign Authority of the United States Because the California Sales Tax Is Imposed on the Retailer so That the Federal Government Does Not Bear the Incidence of the Tax Assessed Under Section 6384 22

1. The California Appellate Decisions Have Consistently Held That the Legal Incidence of the California Sales Tax Is on the Retailer and Insofar as the Purchaser Is Concerned Is Merely Part of the Purchase Price 24

2. The Long Continued Administrative Construction of the California Sales Tax by Both State and Federal Agencies Establishes That This Tax Is Imposed on the Retailer and Not on the Purchaser 30

Page

3. The Berkshire Case Does Not Require a Change in the Long-Established California Rule That the California Sales Tax May Be Validly Applied to the Gross Receipts From Sales to Government Contractors 32

IV

The Court of Appeal Did Not Apply the Buck Act and Did Not Err 42

Conclusion 43

INDEX TO APPENDICES

Appendix "1." Revenue Act of 1932 ..App. p. 1

Appendix "2." State Sales Taxes—Inclusion in Federal Aid Unemployment Compensation Administration Grants 5

Appendix "3." Letter From United States General Accounting Office, Washington, D.C. 20549 to The Hertz Corporation, Dated April 5, 1968 14

TABLE OF AUTHORITIES CITED

Cases	Page
Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 293 (1941)	7
Ainsworth v. Bryant, 34 Cal. 2d 465 (1949)	23, 27
Alabama v. King & Boozer, 314 U.S. 1 (1941)	1, 3, 4, 5, 24, 40, 41, 42
City of Los Angeles v. A.E.C. Los Angeles, 33 Cal. App. 3d 933	40
Clary v. Basalt Rock Co., 99 Cal. App. 2d 458 (1950)	29
Coca-Cola Co. v. State Board of Equalization, 25 Cal. 2d 918 (1945)	31
C. R. Fedrick, Inc. v. State Board of Equalization, 38 Cal. App. 3d 385 (1974)	1
De Aryan v. Akers, 12 Cal. 2d 781 (1939)	27
First Agricultural Bank v. State Tax Commission, 229 N.E. 2d 245 (1967)	23, 36
First Agricultural Bank of Berkshire County v. State Tax Commission, 392 U.S. 339 (1968)	23, 30, 32, 33, 34, 35, 37, 38
General Electric Company v. State Board of Equalization, 111 Cal. App. 2d 180 (1952)	14, 20
Georgia Pacific Corporation v. County of Mendocino, 357 F. Supp. 380	39, 40
Kern-Limerick v. Scurlock, 347 U.S. 110 (1954)	40, 42
King v. State Board of Equalization, 22 Cal. App. 3d 1006 (1972)	7
Livingston Rock & Gravel Co. v. DeSalvo, 136 Cal. App. 2d 156 (1955)	29

Page

Meyer Const. Co. v. Corbett, 7 F. Supp. 616 (N.D. Cal. 1934) 32

Moses Lakes Homes v. Grant County, 365 U.S. 744 (1961) 8, 21

National Ice, Etc. Co. v. Pacific F. Exp. Co., 11 Cal. 2d 283 (1938) 23

Pacific Coast Engineering Co. v. State of California, 111 Cal. App. 2d 31 (1952) 29

People v. Union Oil Co., 268 Cal. App. 2d 566 (1968) 30

Phillips Chemical Co. v. Dumas Independent School District, 361 U.S. 376 8

Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69 (1946) 7

Roth Drug Co. Inc. v. Johnson, 13 Cal. App. 2d 720 (1936) 30

St. Louis S.W. Ry. Co. v. Arkansas, 240 U.S. 227 (1916) 33

Select Base Materials v. Board of Equalization, 51 Cal. 2d 640 (1959) 31

Standard Vacuum Oil Co. v. United States, 339 U.S. 157 (1949) 3, 8

United States v. Mississippi Tax Commission, et al., U.S. District Court for the Southern District of Mississippi, June 12, 1974, 35 CCH State Tax Review No. 48, pp. 3-4 (Nov. 26, 1974) 37 L.Ed. 2d No. 1 41

United States v. State Board of Equalization, Civil No. 72-2568-R 32

Western Lithograph Co. v. State Bd. of Equalization, 11 Cal. 2d 156 (1938) 14, 15, 16, 22, 24, 25, 26, 27, 30, 36

Miscellaneous Page

Opinions of the Attorney General, NS 103 30

Revenue Rulings

Revenue Ruling XII-47 6518 IT 2733 31

Statutes

California Administrative Code, Title 18, Sec. 1521 .....4, 5, 8, 10, 11, 17, 19, 20

California Administrative Code, Title 18, Sec. 1615 .....4, 5, 8, 9, 10, 11, 16, 17, 18, 19, 20

California Retail Sales Tax Act of 1933, Board Ruling No. 11 .....11, 12

California Retail Sales Tax Act of 1933, Board Ruling No. 12 14

California Retail Sales Tax Act of 1933, Sec. 5 .. 15

California Retail Sales Tax Act of 1933, Sec. 5.1 .. 15

California Retail Sales Tax Act of 1933, Sec. 5.3 .....13, 14

California Revenue and Taxation Code, Sec. 6006 20

California Revenue and Taxation Code, Sec. 6007.5 .....5, 8, 9, 41

California Revenue and Taxation Code, Sec. 6051 2

California Revenue and Taxation Code, Sec. 6052 .....2, 27, 30

California Revenue and Taxation Code, Sec. 6053 .....27, 30

California Revenue and Taxation Code, Sec. 6094 2

California Revenue and Taxation Code, Sec. 6201 2

Page

California Revenue and Taxation Code, Sec. 6381 .....3, 4, 14, 16, 17, 19

California Revenue and Taxation Code, Sec. 6381 (a) 16

California Revenue and Taxation Code, Sec. 6381 (b) 16

California Revenue and Taxation Code, Sec. 6384 .....2, 3, 4, 5, 6, 8, 9, 11, 13 .....14, 16, 17, 18, 19, 20, 22, 41

California Revenue and Taxation Code, Secs. 6901-6902 7

California Revenue and Taxation Code, Sec. 6902 7

California Revenue and Taxation Code, Sec. 6904 7

California Revenue and Taxation Code, Sec. 6932 7

California Revenue and Taxation Code, Sec. 6933 7

Massachusetts Sales Tax Act, Subsec. 3 35

Revenue Act of 1942, Sec. 122 31

United States Code, Title 4, Sec. 105 .....5, 42

United States Code, Title 4, Secs. 105-107 4

United States Code, Title 4, Sec. 107 .....3, 5, 42

United States Code, Title 12, Sec. 548 ....23, 24, 25, 27, 38

United States Constitution, Art. VI, Cl. 2 5

Page

Textbooks

Dane, The New Sales and Use Tax Law, 51 Mass. L.Q., pp. 239, 246, 249 ..... 36, 37

Due, John F., State and Local Sales Taxation (1972) 34, 35, 38, 39

Rollman, Lt. Col. Robert O., Hq. AFSC, "Recent Developments in Sovereign Immunity of the Federal Government from State and Local Taxes", 38 North Dakota Law Review, p. 26 41

IN THE

Supreme Court of the United States

October Term, 1974
No. A-1295

C. R. FEDRICK, INC., a corporation,

Petitioner,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S OPPOSING BRIEF

The petitioner has petitioned this Honorable Court for a Writ of Certiorari to the California Court of Appeal, after decision in that court (*C. R. Fedrick, Inc. v. State Board of Equalization,* 38 Cal. App. 3d 385 (1974), Sup. Ct. hearing denied April 24, 1974). Essentially, petitioner has raised a dead issue which was decided by this Honorable Court in 1941 in the case of *Alabama v. King & Boozer,* 314 U.S. 1 (1941) which upheld state taxes on contractors doing business with the United States even as to cost-plus contracts where the terms of the contracts force their payment out of the federal treasury because the legal incidence of the tax is on the contractor, not the government. This is the exact factual situation presented in the petition. California taxes the sale of tangible personal property to contractors with the United States for use in the performance of contracts for the construction of improve-

ments on or to real property in California. Rev. & Tax. Code § 6384. The sales tax is imposed on the retailer who sells to the contractor. Rev. & Tax. Code § 6051. The retailer may collect reimbursement from the contractor if he chooses to do so and the contractor consents. Rev. & Tax. Code § 6052. If the contractor chooses to give a resale certificate instead of paying sales tax reimbursement and later uses the property in the performance of a contract with the United States for the improvement of real property in California he must pay use tax. Rev. & Tax. Code §§ 6094 and 6201. In this case, petitioner either gave resale certificates to its retailers or otherwise purchased its materials ex-tax and used the property in the performance of contracts to improve federal real property in California. The Board collected use tax and sought to collect [additional use tax] by way of counterclaim to the refund action of petitioner.

Petitioner relies upon an erroneous construction of the California Sales and Use Tax Law and cases that are inapposite to reach a conclusion that is totally unsound under both California and federal law. The California sales tax is a tax on retailers and does not fall upon the purchaser which in this case is the contractor for the federal government by reason of the fact that the retailer may reimburse himself only if he desires to do so under section 6052 of the Revenue and Taxation Code. In any event, only a contractor who made purchases as an agent of the United States government, which petitioner did not, would have any standing to assert any *constitutional* immunity of the federal government with respect to sales of supplies, materials and fixtures to the contractor. In enacting section 6384 of the Revenue and Taxation Code, the State of Califor-

nia did not go beyond the holding of the *Alabama v. King & Boozer* case. Section 6384 only acts upon the exemption provided by the Revenue and Taxation Code under section 6381 with respect to sales of tangible personal property to the United States and its instrumentalities and not upon federal immunity under the United States Constitution. Section 6384 treats United States contractors as consumers, that is, purchasers at retail so that the sales tax is imposed upon their suppliers as retailers. This is the settled law of California and no state or federal court has ever ruled to the contrary. Therefore, no authority supports the assertion by petitioner that section 6384 is unconstitutional under the supremacy clause of the constitution or violative of section 107 of Title 4 USC. Therefore no substantial federal question has been raised.

In an attempt to make it appear that there is a federal question petitioner complains that to tax the contractor for his purchase that he uses after giving a resale certificate somehow discriminates against the United States or contractors with whom it deals. In the first place, this issue was not properly raised in the state courts and was not even discussed by the court below. The issue is subject to the rule that this Honorable Court will not review questions not clearly raised on the record. *Standard Vacuum Oil Co. v. United States,* 339 U.S. 157, 160 (1949). In any event there is no discrimination against the United States nor against contractors with the United States. On the contrary, the purpose of section 6384 is to limit the tax exemption provisions in favor of the United States and its instrumentalities provided in section 6381 of the Revenue and Taxation Code. The result achieved is to tax the sale of tangible personal property to United States

contractors used in the improvement of California real property which would otherwise escape tax entirely under section 6381 of the Revenue and Taxation Code because contractors would give resale certificates and sell the property to the United States. Additionally, the tax imposed by reason of section 6384 on government contractors is generally not as great as that imposed on private contractors. The Board, in Regulation 1521, provides that contractors are retailers of tangible personal property that is accessory to a building when installed. The Board in Regulation 1615 has provided that all tangible personal property including accessory tangible personal property installed by government contractors is purchased by them for consumption in the performance of their government contracts and is therefore taxed on the basis of the purchase price paid for the tangible personal property and not the price charged to the federal government. Therefore, when it comes to property which is accessory to a building, government contractors pay less tax than private contractors. Hence there is no unconstitutional burden on the contractor dealing with the United States government but in fact favorable treatment of the government contractor.

Finally, petitioner asserts a federal question as to the applicability of the Buck Act in 4 USC sections 105 to 107. No substantial federal question is raised because the Buck Act does not interefere with the taxes imposed in this case in light of the decision in *Alabama v. King & Boozer, supra,* 314 U.S. 1 (1941). That portion of the decision of the Court of Appeal dealing with the provisions of the Buck Act though correct was unnecessary to the decision in the case in light of the *Alabama v. King & Boozer* case.

The District Court of Appeal held that section 6384 of the California Sales and Use Tax Law is constitutional relying upon *Alabama v. King & Boozer.* Petitioner's theories were rejected as meritless. It is respectfully submitted that the opinion of the Court of Appeal correctly disposes of the only constitutional issue treated in this case so that there is no necessity for a Writ of Certiorari in the United States Supreme Court. This is particularly true in light of the fact that this case has been reversed for a new trial because aside from the constitutional questions California law was misapplied by the trial court. There is absolutely no inconsistency between the opinion of the Court of Appeal and any other decision of California or the United States.

Questions as Presented by Petitioner.

1. Whether sections 6384 and 6007.5 of the Revenue and Taxation Code and sections 1615 and 1521 of Title 18 of the California Administrative Code as interpreted and applied by the California Court of Appeal below are unconstitutional as constituting an invidious discrimination against the federal government and those with whom it deals.

2. Whether said sections as so interpreted and applied are unconstitutional under the supremacy clause of the United States Constitution (Article VI, Clause 2) and section 107 of Title 4 USC.

3. Whether section 105 of the "Buck Act" (4 USC section 105) is wholly inapplicable to the facts of this case and whether this case is governed by section 107 of said Act (4 USC section 107).

ARGUMENT

I

Petitioner Is Precluded From Raising Constitutional Questions Not Properly Raised in the California Courts

It is apparent from the allegations in the complaint of petitioner in the California trial court (Petition for Certiorari, Appendix pp. 4 to 5) and the Conclusions of Law of the trial court in California (Petition for Certiorari, Appendix pp. 32 to 33) that no question as to the constitutionality of the Sales and Use Tax Law of the State of California was either an issue or decided by the California trial court. There was no pleading in the complaint that a claim for refund had been filed on any other grounds than those set forth in the complaint. On appeal the Court of Appeal raised a question as to the territorial taxing jurisdiction of the State of California in the following question:

> "Does the State of California have jurisdiction to exercise its taxing authority over transactions within such facilities if such facilities were acquired by the federal government pursuant to US Constitution, Article I, section 8, clause 17 or otherwise? That is to say, does Revenue and Taxation Code, section 6384, violate the sovereign authority of the federal government?"

The court dealt with that question under the preliminary discussion in its opinion (Petition for Certiorari, Appendix pp. 9 to 13). Also, the appellate court took note that in petitioner's supplemental brief on the question of territorial jurisdiction petitioner argued for the first time on appeal that section 6384 was unconstitutional because the ultimate "incidence" of the tax was

borne by the United States. The appellate court directed its attention to that question and distinguished the cases cited by petitioner (Petition for Certiorari, Appendix, pp. 13 to 15).

The procedure by which a taxpayer may bring suit in California to recover sales and use tax is governed solely by statute. Sections 6901 to 6902[1] require the filing of a claim for refund with the Board. The claim must be in writing and must state the *specific* grounds on which the claim is based. § 6904. Moreover, failure to properly file a claim with the Board within the time allowed by law constitutes a waiver of any demand against the state on account of the overpayment. § 6902. Only after this claim for refund is denied or not acted upon can the taxpayer bring a suit in the courts of California against the Board *upon the grounds set forth in the claim*. §§ 6932 and 6933. This procedure is jurisdictional in nature. *Abelleira v. District Court of Appeal*, 17 Cal. 2d 280, 293 (1941). In *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946), this Honorable Court unequivocally held that the claim for refund *frames and restricts* the issues for litigation, and must set forth the specific grounds upon which the claim is founded. To the same effect is *King v. State Board of Equalization*, 22 Cal. App. 3d 1006, 1015 (1972).

The Board strongly contends that, based upon the authority cited above, petitioner is limited to the legal issues as alleged and set forth in its complaint. Certainly, petitioner is limited to the questions in issue on appeal and not issues that were raised by supplemen-

[1]All references are to the California Revenue and Taxation Code.

tal brief for the first time on appeal. Beyond question petitioner is limited to questions that were specifically dealt with by the Court of Appeal. *Standard Vacuum Oil Co. v. United States*, 339 U.S. 157, 160 (1949). Therefore, the Board submits that in this petition the only legal issues that petitioner may raise are those specifically set forth as grounds in its complaint or properly raised on appeal. We respectfully submit that none of the questions presented by the Petition for a Writ of Certiorari were properly raised or considered by the Court of Appeal of the State of California and that therefore petitioner has not raised any substantial federal question for consideration by this Honorable Court.

II

Sections 6384 and 6007.5 of the California Revenue and Taxation Code and Sections 1521 and 1615 of the California Administrative Code Are Valid and Do Not Constitute an Invidious Discrimination Against the Federal Government and Its Contractors

Petitioner contends that sections 6384 and 6007.5 of the California Revenue and Taxation Code and Sections 1521 and 1615 of the California Administrative Code as interpreted and applied by the Court of Appeal below are unconstitutional as constituting an invidious discrimination against the federal government and those with whom it deals contrary to the rule in *Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 376 and *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744. As we have pointed out, this issue was not properly raised in the Court of Appeal nor was it discussed in the opinion of the Court of Appeal. It was not raised in the claim for

refund or in the complaint in the trial court in California and was not decided by the trial court in California. Nevertheless, we will answer to the contention because it is clearly without merit. Section 6007.5 provides:

> "A sale of tangible personal property to a contractor or subcontractor for use in the performance of contracts with the United States for the construction of improvements on or to real property in this State *is a retail sale*. The gross receipts from such a sale or the sales price of property so sold shall be included in the measure of the taxes imposed by this part."

Section 6384 provides:

> "Notwithstanding any other provision of law the tax imposed under this part shall apply to the gross receipts from the sale of any tangible personal property to contractors purchasing such property either as the agents of the United States or for their account and subsequent resale to the United States for use in the performance of contracts with the United States for the construction of improvements on or to real property in this State."

Regulation 1615 provides:

> "United States Contractors. Either the sales tax or the use tax applies with respect to sales of tangible personal property (including materials, fixtures, supplies and equipment) to contractors or subcontractors for use in the performance of contracts with the United States for the construction of improvements on or to real property in this state. The fact that the contract may provide principally for the manufacture or acquisition of tan-

gible personal property is immaterial. The sales tax, *but not the use tax,* applies even though the contractor purchases the property as the agent of the United States.

"Tax does not apply to sales of 'machinery and equipment' to contractors or subcontractors." (Emphasis added.)

Regulation 1521 provides:

"Contractors are consumers of *materials* used by them in fulfilling construction contracts and the tax applies to the sale of such materials to the contractors.

"If, however, in the case of a time-and-material contract, the contractor bills his customer an amount for 'sales tax' computed upon his marked up billing for materials, it will be assumed, in the absence of convincing evidence to the contrary, that he regards himself as selling the materials so billed, and tax will apply to the amount of the billing for materials.

"Contractors are retailers of '*fixtures*' which they furnish and install and tax applies to the retail selling price thereof; which, in the case of lump sum construction contracts, is regarded as the cost price of the fixtures to the contractors. If the contractor is the manufacturer of the fixtures, the retail selling price thereof is the prevailing price at which similar fixtures in similar quantities ready for installation would be sold to contractors."

Generally "materials" are those materials which are used in constructing buildings, whereas "fixtures" are accessories to the buildings which are installed such as

lighting, plumbing, heating, air conditioning, refrigeration, elevator and other equipment for use in the operation of the building itself as distinguished from an activity within the building.

Petitioner argues that by Regulation 1521 and Regulation 1615, the Board discriminates in its application of the Sales and Use Tax Law in favor of construction contractors for the private sector of industry and against construction contractors for the United States. The Board does not discriminate between contractors and is merely following the statutory law of the State of California as set forth in section 6384 of the Sales and Use Tax Law.

Section 6384 is not designed to discriminate against the United States or its contractors. It is designed to define the limits of the *statutory* exemption granted to the United States by California. It does not have any bearing upon or relation to the United States *Constitutional* tax exemption of the United States government. A little history of the development of the statutes and the two regulations will demonstrate this point.

Following the enactment of the Retail Sales Tax Act, effective August 1, 1933, the original rule of the Board pertaining to contracts involving contractors was adopted by the Board in 1933 and designated as Ruling No. 11, Contractors and Subcontractors. Under the ruling, certain installation contractors were considered to be retailers rather than consumers of the equipment and components, and sales tax liability with respect thereto was measured by the fair retail price of the property exclusive of installation charges provided the charges were segregated in the records of the contractor. Otherwise, tax was payable on the full con-

tract price. The purpose of the regulation was to prevent the taxation of nontaxable installation services by distinguishing between contractors primarily selling services and those primarily selling tangible personal property.

There was no change in the ruling with respect to such installations until April 21, 1937, when the wording of Ruling 11 was revised, but the basic application of the tax was unchanged. The installer continued to be regarded as the retailer of equipment, taxable on its fair retail price if segregated in his records from the installation charges.

On March 23, 1939, amendments to Ruling 11 included the use, for the first time, of the terms "materials" and "fixtures." Each term was defined, along with an illustrative, but not exclusive, list of the kinds of property included in each category. The ruling provided that contractors were consumers of "materials" and retailers of "fixtures." The measure of tax, with respect to "materials," was stated to be the gross receipts from the sale of the "materials" to the contractor. The measure of tax with respect to "fixtures" was stated to be the "retail selling price" of the fixtures, which, in case the contractor "includes installation of fixtures in a contract, along with materials, labor, and other services, and, accordingly, does not invoice the selling price of the fixtures separately from the other items of the contract, the selling price of the fixtures shall be deemed to be the fair retail selling price of such fixtures, which shall not be less than the price of which similar fixtures, in similar quantities, would be sold to other contractors."

Subsequent amendments to Ruling 11 made no change in the application of the tax with respect to

"materials" or "fixtures," except in the case of contracts with the United States. An amendment effective June 11, 1941, added the following paragraph:

> "Contractors are the consumers of tangible personal property (including materials, supplies, fixtures, and equipment) used in the performance of contracts with the United States for the construction of improvement to real property, and the tax applies to the gross receipts from the sale of such tangible personal property to the contractors."

This amendment *was required* to conform the ruling to section 5.3 of the Retail Sales Tax Act of 1933 (later renumbered as Section 6384 of the Sales and Use Tax Law). This section became effective also June 11, 1941, the same date as the amendment to the Ruling, and provided:

> "Notwithstanding any other provision of law the tax imposed under this act shall apply to the gross receipts from the sale of *any* tangible personal property to contractors purchasing such property either as the agents of the United States or for their own account and subsequent resale to the United States for use in the performance of contracts with the United States for the construction of improvements on or to real property." (Emphasis added.)

Because the section provided that tax applies to the sale of *any* tangible personal property to contractors with the United States improving real property, it was necessary to provide in the ruling that such a contractor was the consumer not only of "materials," but of "fixtures" as well.

In 1943, effective July 11, the Retail Sales Tax Act of 1933 and the Use Tax Act of 1935 became part of the Revenue and Taxation Code, known and cited as the "Sales and Use Tax Law." Section 5.3 of the Retail Sales Tax Act became Section 6384 of the Sales and Use Tax Law, and, effective July 1, 1943, Ruling 12 was adopted, entitled "United States Contractors," based upon section 6384, and superseding the paragraph added to Ruling 11 in 1941 relating to United States Contractors.

As noted in the history of the law and rulings, section 6384 *requires* a different application of tax with respect to "fixtures" sold to United States contractors, as compared to "fixtures" sold to other contractors.

The case of *General Electric Company v. State Board of Equalization*, 111 Cal. App. 2d 180, 191-92 (1952) specifically points to section 6384 as necessitating such "duality of treatment," in the following clear, unambiguous language at page 192:

> "Rule 12 was made necessary by the specific provisions of the tax statute. Section 6381 of the Revenue and Taxation Code exempts from the sales tax gross receipts derived from the sale of tangible personal property to the United States. Section 6384 of that code, in order that the state shall collect some tax, requires that contractors shall be regarded as consumers. Unless they were so treated, contractors with the United States would pay no tax at all. This appears to be a reasonable basis for this classification between contractors."

The case of *Western Lithograph Co. v. State Bd. of Equalization*, 11 Cal. 2d 156 (1938) was decided in 1938, the year before section 6381 was enacted.

At the time the case was decided, the only tax exemption in the law for sales to the United States was provided in section 5 of the 1933 Retail Sales Tax Act which exempted, "the gross receipts from sales of tangible personal property which this state is prohibited from taxing *under the Constitution* or *laws of the United States of America,* or under the *Constitution* of this *State.*" The *Western Lithograph* case held that under the Constitution of the United States and the State of California, a sales tax is not an unconstitutional tax upon a federal instrumentality unless it is imposed directly upon that federal instrumentality. The California sales tax is imposed on the retailer. Only reimbursement is collected from the purchaser. We will cover this point exhaustively below in Argument III. The following year in 1939, the Legislature enacted section 5.1 of the Retail Sales Act of 1933, which provided:

> "There are hereby specifically exempted from the provisions of this act and from the computation of the amount of taxes levied, assessed or payable hereunder the gross receipts from the sale of any tangible personal property to the United States or any agency or instrumentality thereof except a corporate agency or corporate instrumentality."

This act was an urgency measure and was explained as necessary because,

> "Bids running into millions of dollars have been submitted by California firms to the Federal Government for contracts to supply necessary materials for Federal construction projects.
>
> "All these bids were submitted upon the assumption that the Retail Sales Act of 1933 was

inapplicable to receipts derived from sales to Federal instrumentalities. Recently however, the redefinition of the scope of state authority to tax Federal instrumentalities has made such receipts subject to that Act.

"Unless this Act goes into immediate effect, the firms which have submitted these bids will be compelled to withdraw them, bids submitted by firms in other States will be accepted instead, and the material well-being of the people of California will be definitely impaired and retarded."

This section, subsequently in 1941, became section 6381 of the Revenue and Taxation Code and obviously provides for an exemption from sales tax on a retailer when that retailer makes a sale to a federal instrumentality regardless of the lack of a constitutional exemption as decided in the *Western Lithograph* case.

Section 6381 has no application to a tax directly imposed upon a federal instrumentality. Such a tax would be prohibited by the United States Constitution as in the case of the use tax which is imposed on the consumer. Section 6381 is an exemption granted to *retailers* to the United States. It has no application whatsoever to sales or use *by* the United States. Furthermore, the exemption in terms is absolute, provided the purchaser is any of the purchasers enumerated in (a) or (b) of section 6381, without regard to whether the tax *on the retailer* constitutes a substantial interference with federal governmental functions.

Section 6384, upon which Regulation 1615 on United States contractors is based, *narrows* the scope of section 6381, by excluding from the state enacted exemption, sales of *any* property (including necessarily, "fix-

tures") to United States contractors. This has the effect of imposing tax upon sales of "fixtures" to United States contractors which would otherwise be exempt as sales for resale to the United States, the resale or sales to agents of the United States both being exempt under section 6381. This section, as above explained, did in fact enlarge the tax base by applying the tax to sales to United States contractors of certain property, including "fixtures," that would otherwise be exempt as sales for resale to the United States.

Regulation 1615 merely implements section 6384 which taxes the sale of *all* tangible personal property to contractors when used in government land improvement contracts. Without section 6384 and Regulation 1615, contractors can set up their contracts to resell to the United States or act as agents for the United States. In either case, section 6381 would have exempted the transaction.

Petitioner dwells at length upon the apparent inconsistency between the definition of "fixtures" in Regulations 1521 and 1615. While the terminology may appear inconsistent, it must be remembered that because of section 6384 there can be no different tax application between sales of "materials" and sales of "fixtures" to United States government contractors. The only distinction drawn by Regulation 1615 is between "fixtures" and "machinery and equipment," the latter being considered personal property sold by the contractor to the United States, under certain conditions. The term "fixtures" is defined in differing terminology in the two regulations, and hence does not have the same meaning in both regulations. The purpose of the definition of a "fixture" in Regulation 1521 is to distinguish "fix-

tures" from "materials" that is why "materials" are defined as being combined with each other, *integral* and *inseparable* parts of the completed structure, whereas "fixtures" are defined as accessories and which do not lose their identity as accessories when placed or installed. The distinction sought in these definitions is that between those portions of the building which have become incorporated and are inseparable from the completed structure and those portions which are clearly identifiable as accessories and removable after having been placed or installed.

The purpose of the definition of "fixtures" in Regulation 1615 is to distinguish "fixtures" which are taxable when purchased by a contractor because of their intended use as improvements to realty under section 6384 of the Revenue and Taxation Code from "machinery and equipment" which is not taxable in that such units are not a part of a structure on land. Consequently, fixtures are defined, " 'fixtures,' as distinguished from 'machinery and equipment,' are things which are necessary to a structure and so firmly attached to the realty as to constitute a part of the structure. They are essential to the use of the building or other structure.

It should be noticed that the word "inseparable" is left out of that definition. The purpose of the definition is merely to distinguish "fixtures" from "machinery and equipment" which are not a part of the structure nor accessory to the structure itself and which according to section 6384 of the Revenue and Taxation Code would not be taxable because they are not "improvements on or to real property to this State." It follows that there is no disparity between the two definitions because they have entirely different purposes. As noted above, the different tax treatment of "fixtures" in United States

government and non-United States government contracts is necessitated by section 6384.

Actually, the term "fixtures" as used in Regulation 1615 is inclusive of property that would fall within the definition of "materials" in Regulation 1521. This is perfectly consistent with the law, since section 6384 in effect wipes out the distinction between "materials" and "fixtures" insofar as sales to United States construction contractors is concerned. Petitioner's analysis of the law is erroneous and therefore its conclusion is without any legal foundation.

In summary then, it is the statutory policy of the State of California under section 6381 of the Revenue and Taxation Code to exempt from sales taxation, sales to the United States or its instrumentalities. Under this section, in the absence of any other statute, contractors for United States government improvements to real property would not pay any sales tax on "materials" or "fixtures" used in such construction because under the law they could be purchasing as agents for the United States or for resale to the United States and would be exempted from tax. They would not have to pay sales tax reimbursement or use tax as the "materials" and "fixtures" would be purchased for resale. Inasmuch as the resale would be to the United States government, it would be tax exempted under section 6381 of the Revenue and Taxation Code. It is for this reason that the Legislature, in order to impose a limit on this statutory exemption, enacted section 6384 to provide that contractors of the United States government make taxable purchases of the "materials" and "fixtures" which they use in the construction of improvement on or to real property in this state. Regulation 1615 is *required* by that statute. Therefore, Regula-

tion 1615 cannot be held to be discriminatory against United States contractors. The authority cited by Petitioner is no answer, particularly in light of *General Electric* which upheld the regulation of the State Board of Equalization under section 6384 of the Revenue and Taxation Code.

Contractors both for the state and its political subdivision and the federal government are taxed as consumers of "materials" which become an integral and inseparable part of the completed structure and consequently are assessed identical taxes.

The facts are that if a construction contractor, performing a construction contract for the improvement of real property in this state for the United States government purchased "materials" as defined in Regulation 1521 for such use, and the same contractor purchased identical materials for use in constructing a similar or identical building for a non-United States government customer, the tax would be imposed upon the same measure, provided that the cost to the contractor was the same. A sales tax would be imposed on the retailer selling to the contractor in both instances.

Under section 6006 and Regulation 1521 all but United States contractors are retailers of "fixtures." This law in fact, imposes a greater tax on the non-government contractor than a government contractor would bear in some cases because the government contractor is never treated as a retailer of tangible personal property in United States government contracts. He only pays sales tax reimbursement on his cost of purchase.

The case in which the tax is greater on the private contractor is where a manufacturer of fixtures is also the installing contractor. Petitioner did not manufacture any of the fixtures in this case and has no standing to complain. This is true because the manufacturing contractor must pay sales tax on the cost of the labor and overhead involved in the fabrication of this fixture. A government contractor would not have to pay such tax but would be deemed a consumer of the materials used in the manufacture of the fixture. It would appear that Petitioner's argument fails because of its reliance on *Moses Lakes Homes v. Grant County,* 365 U.S. 744, 751 (1961), where it is stated:

> "If anything is settled in the law, it is that a State may not discriminate *against* the Federal Government or its lessees." (Emphasis added).

In the Board's administration of the Sales and Use Tax Law the United States government construction contractor is certainly not discriminated *against* insofar as measure of tax is concerned. In fact, in the usual case, the United States government contractor pays less tax with respect to a similar construction job for the improvement to real property because he is a consumer of fixtures rather than the retailer of them.

One final point. It is utter nonsense to argue that the State of California enjoys a tax advantage over the United States in California state construction by virtue of the Sales Tax revenues it receives (Petition p. 13). Clearly, the tax burden paid by one agency of government is not offset by general fund revenue. The

argument demonstrates the length to which petitioner has gone to foist phoney issues upon this Honorable Court.

III

Revenue and Taxation Code Section 6384 Does Not Violate the Sovereign Authority of the United States Because the California Sales Tax Is Imposed on the Retailer so That the Federal Government Does Not Bear the Incidence of the Tax Assessed Under Section 6384

Petitioner challenges the validity of the sales tax imposed by the board on suppliers of government contractors as unconstitutional. In essence, Petitioner maintains that the legal incidence of the sales tax is on the purchaser as opposed to the retailer and that therefore the board has taxed the United States, exempt from such taxation under the provisions of section 548 of Title 12 of the United States Code in effect during the period here in controversy.

This contention is not a new one. Nearly 40 years ago this issue was litigated in *Western Lithograph Co. v. State Bd. of Equalization, supra,* 11 Cal. 2d 156 (1938). The California Supreme Court there held that the California sales tax was a tax on the retailer and as such was properly imposed upon retailers selling tangible personal property to national banks. 11 Cal. 2d 156 at 164. Even before the decision in the *Western Lithograph* case was handed down in 1938, California appellate courts and administrative agencies had uniformly held and still hold today that the California sales tax is a tax on the retailer and not the purchaser.

Indeed, in *National Ice, Etc. Co. v. Pacific F. Exp. Co.*, 11 Cal. 2d 283, 293 (1938), and again in *Ainsworth v. Bryant*, 34 Cal. 2d 465, 474 (1949), the California Supreme Court held that the retailer was under no obligation to reimburse himself from his customers and that his election to do so or not was merely optional. These holdings are in direct contradiction to Petitioner's contention that somehow the legal incidence of the California sales tax is on the purchaser.

In seeking to overturn these holdings, respondent relies upon *First Agricultural Bank of Berkshire County v. State Tax Commission*, 392 U.S. 339 (1968).

In the *Berkshire* case, this Honorable Court expressly recognized that a tax whose legal incidence was on the vendor could validly apply to sales to national banks. 392 U.S. 339 at 346, 347. The Massachusetts Supreme Court in the *Berkshire* case had labeled the Massachusetts sales tax as a "hybrid tax," which, unlike the California sales tax, the retailer was required to collect from the purchaser. *First Agricultural Bank v. State Tax Commission*, 229 N.E. 2d 245 (1967). This Honorable Court concluded that such hybrid type taxes which the retailer was required to add to the selling price collected from the purchaser could not be applied to sales to national banks under the provisions of section 548 of Title 12 of the United States Code.

Although the California sales tax has been consistently recognized as a vendor type tax (*i.e.*, a tax on the retailer only) by the appellate courts of this state as well as by state and federal agencies for almost 40 years, respondent now asserts that as a matter of federal law it is a tax on the purchaser. It will be demonstrated herein that Petitioner's contentions in this regard are unsupportable.

1. The California Appellate Decisions Have Consistently Held That the Legal Incidence of the California Sales Tax Is on the Retailer and Insofar as the Purchaser Is Concerned Is Merely Part of the Purchase Price

It is clear under the holdings of the California appellate cases that Petitioner's suppliers bore the legal incidence of the California sales tax and that its application to their gross receipts from sales to Petitioner was valid. There is no evidence that Petitioner was an agent for the United States in any event. Petitioner, in fact, claimed that the electric transmission lines were tangible personal property sold to the United States. No longer do they so contend inasmuch as electrical distribution lines are structures on land under *King*. Petitioner was taxed use tax on tangible personal property acquired ex-tax or on resale certificates. Therefore, even were Petitioner's contentions correct, the tax fell *not* on the United States but on Petitioner and was constitutional even under the contention that the California sales tax is on the purchaser, which of course, it is not. *Alabama v. King & Boozer*, 314 U.S. 1 (1941).

As noted earlier in this brief, this very issue of the validity of applying the California sales tax to gross receipts from sales to national banks has already been litigated in *Western Lithograph Co. v. State Bd. of Equalization, supra*, 11 Cal. 2d 156. The *Western Lithograph* case involved the sale of merchandise to a national banking association, Bank of America, on which Western Lithograph had paid sales tax measured by gross recepts from such sales. It was there argued by the plaintiff that the collection of sales tax reimbursement from the bank was violative of section 548 of Title 12 of the United States Code, which was

identical in terms with the provision of that section during the period involved in this litigation.[2]

In rejecting arguments basically similar to those advanced by Petitioner in the instant case, the California Supreme Court in the *Western Lithograph* case said:

> "The provisions of the act itself specifically are that the tax is laid upon and is a direct obligation of the retailer. Although the act furnishes the method by which the retailer may calculate reimbursement to himself by listing separately the amount of the tax from the sales price, *nevertheless section 8½ and other provisions of the act specially negative any intent of the legislature that the tax should be considered as a tax on the consumer.* In every case in which that question has arisen under the California Retail Sales Tax Act, the courts have uniformly and consistently recognized the legislative intent and adhered to the construction that the tax is upon the retailer and not upon the consumer. [Citations.]" (Emphasis added). 11 Cal. 2d 156 at 162.

The court then went on to point out:

> "The law contemplates the imposition of the fixed rate of the tax on the gross receipts, as defined by the act, and not on the individual sale of merchandise; and the provision for a bookkeeping method to compute the amount of the tax separately from the sales price does not alter this fact (Roth Drug, Inc., v. Johnson, supra, p. 738.)

[2] Section 548 of Title 12 of the United States Code was amended in 1969 to end restrictions on the power of the states to apply any form of sales or use tax to national banks located within the taxing state.

'That in ultimate effect the fund out of which payment [of the tax] is made may be or in fact has been obtained by the dealer from his customers does not make the tax a levy upon the consumer.' (People v. Herbert's of Los Angeles, Inc., supra.)

"*As noted in Meyer Construction Co. v. Corbett, supra, the act creates the relationship of sovereign power and taxpayer between the state and the retailer, and not between the state and the consumer.* Therefore when the question has been whether the tax is collectible on receipts from sales to municipalities within the state for use in governmental functions it has been held that the retailer must pay the tax. (Rio Grande Oil Co. v. Los Angeles, supra; Graham Brothers v. Los Angeles, supra)." (Emphasis added). 11 Cal. 2d 156 at 163.

The court, after pointing out that the purpose of separately stating the amount of sales tax reimbursement was designed to avoid including the amount of sales tax reimbursement in the measure of the tax, went on to state:

". . . *The tax being a direct obligation of the retailer and, so far as the consumer is concerned, a part of the price paid for the goods and nothing else, it is neither in fact nor in effect laid upon the consumer. It does not become a tax on the sale nor because of the sale, but remains an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales.*" (Emphasis added). 11 Cal. 2d 156 at 164.

The decision in the *Western Lithograph* case upholding the application of the California sales tax to

the gross receipts from sales to national banks has stood unchallenged until recently. Nor does the *Western Lithograph* case stand alone as establishing the construction by the California appellate courts of the California sales tax as a tax on the retailer and not on the purchaser. The California appellate courts have consistently held that as to the purchaser the amount added as sales tax reimbursement is only part of the purchase price. *De Aryan v. Akers*, 12 Cal. 2d 781, 786 (1939).

Petitioner nevertheless asserts that the government contractor is the taxpayer since section 6052 of the Revenue and Taxation Code provides "The tax hereby imposed shall be collected by the retailer from the consumer *insofar as it can be done.*" (Emphasis added). Petitioner also makes reference to section 6053 of the Revenue and Taxation Code which precludes a retailer from advertising that he will absorb the tax as supporting their position. Despite declarations of the California Supreme Court to the contrary, Petitioner insists that these provisions evidence legislative intent that the consumer pay the sales tax and, therefore, the California sales tax is really a tax on the consumer which was barred by the provisions of section 548 of Title 12 of the United States Code prior to its recent amendment in 1969.

As previously noted, Petitioner's construction of the California sales tax has been expressly rejected by the California Supreme Court. Thus, in *Ainsworth v. Bryant, supra*, 34 Cal. 2d 465 (1949), the California Supreme Court in reviewing the California cases relat-

ing to this matter laid emphasis on the optional nature of the sales tax reimbursement provided for in the California sales tax statute. In that regard the Court said:

> "Reverting now to consideration of the terms of the San Francisco ordinance, the question arises as to exactly what kind of a tax is thereby imposed. Whatever it is and by whatever name it may be called, the character of the tax 'must be ascertained by its incidents, and from the natural and legal effect of the language employed in the [legislative enactment].' (Ingels v. Riley, 5 Cal. 2d 154, 159 [53 P.2d 939, 103 A.L.R. 1].) As appears from the above quoted portions of the ordinance, the tax is exacted of the consumer upon each transaction of sale, thus affecting the 'freedom of purchase' within the city. (53 C.J.S. 448.) So classified, it falls under the generic heading of a sales tax (47 Am.Jr. 194), but it rests on a wholly different concept from that underlying an occupation tax imposed upon a merchant for the privilege of doing business and measured by the gross receipts from sales. Illustrative of this latter type is the California Retail Sales Tax Act (Stats. 1933, p. 2599; as amended), which 'specifically declares that the tax is imposed *on retail merchants*, and not on the consumers. Section 3 provides in that regard, "For the privilege of selling tangible personal property *at retail a tax is hereby imposed upon retailers.*" Section 8 of the act further provides that "The tax levied hereunder *shall be a direct obligation of the retailer.*" ' (Roth Drug, Inc. v. Johnson, 13 Cal.App. 2d 720, 736 [57 P.2d 1022].) In view of such explicit provi-

ions establishing that 'the tax [is] on the retailer and not on the consumer' (Meyer Const. Co. v. Corbett (Cal.), 7 F.Supp. 616, 618), the cases have consistently so construed the act in recognition of the legislative intent. (National Ice & Cold Storage Co. v. Pacific Fruit Express Co., 11 Cal. 2d 283, 289 [79 P.2d 380], and cases cited; see, also, Western Lithograph Co. v. State Board of Equalization, 11 Cal.2d 156, 162 [78 P.2d 731, 117 A.L.R. 838]; De Aryan v. Akers, 12 Cal. 2d 781, 783 [87 P.2d 695].) While the act authorizes the retailer to collect the tax *'from the consumer in so far as the same can be done' (§ 8½), that does not make it a consumer's tax. Rather under the cited section, it is 'merely optional with the retail merchant as to whether he will reimburse himself from his customers for the tax he is compelled to pay'* (emphasis added; Roth Drug, Inc., v. Johnson, supra 13 Cal.App.2d 720, 736) as his direct obligation to the state in order 'to be allowed to sell tangible personal property at retail.' (Meyer Const. Co. v. Corbett (Cal.) supra, 7 F.Supp. 616, 618.)" (Emphasis added). 34 Cal. 2d 465 at 473-74.

The California cases further establish that the retailer is not entitled to sales tax reimbursement under circumstances where provision for its payment is not included in the terms of the contract. *Pacific Coast Engineering Co. v. State of California,* 111 Cal. App. 2d 31 (1952); *Clary v. Basalt Rock Co.,* 99 Cal. App. 2d 458 (1950); *Livingston Rock & Gravel Co. v. DeSalvo,* 136 Cal. App. 2d 156 (1955). These cases further establish that, contrary to the contention of petitioner, sections

6052 and 6053 do not require the retailer to collect sales tax from the purchaser if he does not choose to do so.

2. The Long Continued Administrative Construction of the California Sales Tax by Both State and Federal Agencies Establishes That This Tax Is Imposed on the Retailer and Not on the Purchaser

The state taxing authorities as well as the California appellate courts have consistently construed the sales tax as being imposed on the retailer who has the option to reimburse himself from the customer if he chooses to do so. This construction is evidenced by the litigated position taken in cases such as *Roth Drug Co. Inc. v. Johnson,* 13 Cal. App. 2d 720 (1936), where the court accepted the state's contention that sales tax reimbursement was merely optional with the retailer and he could waive his right to such reimbursement. 13 Cal. App. 2d 720, 736. To the same effect see Attorney General Opinion NS 103 rendered on December 23, 1936, wherein it was concluded that the retailer is permitted to pass on the sales tax but is not required to do so. The opinions of the Attorney General are of public record and the lapse of time since the first announcement of the opinion supports the inference that if it were contrary to legislative intent, some corrective measure would have been adopted. *See People v. Union Oil Co.,* 268 Cal. App. 2d 566, 571 (1968). The position that the legal incidence of the tax is on the retailer was also successfully taken by the Board in the *Western Lithograph* case discussed above and has been consistently followed since that time. Both before and after the decision in the *Berkshire* case the Board of Equalization has consistently taken the position that

since the legal incidence of the sales tax is on the retailer, it may be validly applied to the gross receipts from sales to government contractors. Contemporaneous administrative construction by the Board, while not necessarily controlling, "is entitled to great weight and the courts generally will not depart from such construction unless it is clearly erroneous or unauthorized." *Select Base Materials v. Board of Equalization*, 51 Cal. 2d 640, 647 (1959), quoting from *Coca-Cola Co. v. State Board of Equalization*, 25 Cal. 2d 918, 921 (1945).

Moreover, federal governmental agencies for thirty-five years have recognized that the legal incidence of the California sales tax is on the retailer rather than the consumer.

Various agencies of the federal government have concurred in the proposition that the California sales tax is a vendor type tax and that the legal incidence of the California sales tax is on the retailer rather than the consumer. Shortly after the passage of the California Retail Sales Act of 1933, the Internal Revenue Service ruled in Revenue Ruling XII-47 6518 IT 2733 that the legal incidence of the California sales tax was on the vendor so that the retailer alone could deduct the tax for federal income tax purposes. A copy of this Ruling is attached as Appendix 1 hereto.[3] Then in Decisions of the Controller A 88689 promulgated on January 31, 1942 (a copy of which is attached to this brief as Appendix 2), the United States Controller

[3]This ruling was handed down prior to the enactment of section 122 of the Revenue Act of 1942 which expressly made sales taxes imposed on the retailer deductible by the consumer. At this earlier time, consumers could not claim such a deduction if, as in California, the tax was imposed upon and paid by the retailer and not the consumer.

General clearly recognized that the California sales tax was on the retailer with the result that it was applicable to items purchased as necessary for the proper administration of the unemployment compensation laws and could be included in grants for that purpose. Further, in 1968 the United States General Accounting Office adhered to this view as to the legal incidence of the California sales tax. A copy of the letter from the office of the General Counsel of the United States Accounting Office is attached hereto as Appendix 3.[4] In accord, *Meyer Const. Co. v. Corbett,* 7 F. Supp. 616 (N.D. Cal. 1934), apparently the only final federal court decision dealing with the legal incidence of the California sales tax.

3. The Berkshire Case Does Not Require a Change in the Long-Established California Rule That the California Sales Tax May Be Validly Applied to the Gross Receipts From Sales to Government Contractors

The holding of *First Agricultural Bank of Berkshire County v. State Tax Commission, supra,* 392 U.S. 339, does not require a change in the long-established judicial and administrative construction to the effect that the legal incidence of the California sales tax is on the retailer with the result that it may be validly applied to the gross receipts from sales to government contractors. While Petitioner asserts that the matter of the legal incidence of the tax is purely a matter of federal law, this Honorable Court has made clear that in deciding the nature and incidence of the tax it is necessary to consider how the tax in fact operates.

---

[4]This document is attached as an exhibit to the stipulation of Facts in *United States v. State Board of Equalization,* Civil No. 72-2568-R, which is cited at page 7 of Respondent's Supplemental Brief.

Thus, the United States Supreme Court has held that in a matter involving federal rights, the meaning to be given to a state statute turns not on the characterization which the state has given the tax but on its operation and effect. *St. Louis S.W. Ry. Co. v. Arkansas*, 240 U.S. 227, 231 (1916). The thirty-eight years of California case law and administrative construction outlined above establish a pattern of operation which demonstrates that the purchaser has no obligation to pay the sales tax and that its legal incidence clearly falls on the vendor.

In the *Berkshire* case this Honorable Court based its holding of invalidity of the Massachusetts tax on the fact that under the Massachusetts statutes it was mandatory for the retailer to pass the tax on to the purchaser. In that regard it was said:

> "It would appear to be indisputable that a sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser. See Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95, 99. Subsection 3 of the Massachuetts sales tax provides:
>
> " 'Reimbursement for the tax hereby imposed *shall be paid by the purchaser* to the vendor and each vendor in this commonwealth *shall add to the sales price and shall collect from the purchaser the full amount of the tax imposed by this section,* or an amount equal as nearly as possible or practicable to the average equivalent thereof; *and such tax shall be a debt from the purchaser to the vendor,* when so added to the sales price, and shall be recoverable at law in the same manner as other debts.' Acts and Resolves, 1966, c. 14, § 1, subsec. 3. (Emphasis added.)

"This subsection reads to us as a clear requirement that the sales tax be passed on to the purchaser. . . ." (Emphasis added). 392 U.S. at 347-48.

Unlike the so-called hybrid type sales tax of Massachusetts involved in the *Berkshire* case, there is in California no mandatory requirement that the California sales tax be passed on to the purchaser. Moreover, in construing whether reimbursement is mandatory or not, the state court construction is obviously controlled in establishing the way the statute operates in practice.

As indicated by the cases cited above, the California sales tax is clearly a vendor type tax which does not mandate any payment by the purchaser.

In discussing the sales taxes of the various states the leading authority on the subject, John F. Due, in his book State and Local Sales Taxation (1972), had this to say about the vendor type taxes:

"VENDOR TAXES

"Fourteen of the taxes are, at least by law, basically vendor levies. They are imposed on the legal basis of the 'privilege' of engaging in business as a retailer or of the closely related concept of the 'privilege' of selling at retail. This vendor-tax group consists of Arizona, California, Connecticut, Hawaii, Kentucky, Michigan, Nevada, New Mexico, North Dakota, South Carolina, South Dakota, Tennessee, Virginia and Wisconsin.

"None of these states requires shifting of the tax to the consumer. California, Connecticut, Nevada, and Tennessee require shifting 'insofar as possible,' a phrase having little significance except to make clear the legislative intent. Kentucky,

Michigan, North Dakota, South Carolina, South Dakota, and Virginia indicate that the tax 'may' be shifted. The laws in Arizona, Hawaii, New Mexico, and Wisconsin, the most strictly 'vendor' taxes of all, do not mention shifting."

Professor Due distinguished vendor type taxes from hybrid taxes of the type involved in the *Berkshire* case as follows:

"HYBRID TAXES

"In thirteen states, plus the District of Columbia, the sales taxes contain both vendor and consumer features. The courts determine the precise legal status and most are held to be vendor taxes. Taxes are imposed on the vendor for the privilege of carrying on business or selling at retail, but the laws contain mandatory shifting provision. In other words, the tax is legally imposed upon the vendor, but he is required to collect it from the consumer."

The Massachusetts sales tax is universally recognized as a "hybrid type" tax rather than a vendor type tax as exists in California. In contrast to the California sales tax statute, the Massachusetts statute contains a mandatory requirement that the sales tax shall be passed on to the purchaser (See subsection 3 of the Massachusetts Sales Tax Act quoted above in the statement from the decision in the *Berkshire* case). In addition, it is to be observed that the Massachusetts statute, which was enacted in 1966, was being judicially construed for the first time in the *Berkshire* case. Unlike the situation in California in which there has been 40 years of judicial and administrative construction demonstrating the practical operation of the California law, this Honorable Court could only look to the lan-

guage of the Massachusetts statute as a guide to its meaning and operation.

The Massachusetts Supreme Court in construing its statute in *First Agricultural Bank v. State Tax Commission*, 229 N.E. 2d 245 (1967) at 249, recognized that the Massachusetts type sales tax was to be distinguished from the California type sales tax. The Massachusetts Supreme Court in referring to the California case of *Western Lithograph v. State Board of Equalization, supra*, 11 Cal. 2d 156, pointed out that the California sales tax was a vendor type tax with the legal incidence on the retailer. The Massachusetts court went on to say:

> "Our act is neither a vendor tax nor a purchaser tax but a hybrid containing elements of both vendor and purchaser taxes. See Dane, The New Sales and Use Tax Law, 51 Mass. L.Q. 239, 246, 249 (229 N.E.2d 245 at 249)."

In the article by Dane referred to in 51 Mass. Law Quarterly 241 at 246, the course of discussing the Massachusetts sales tax the distinction is made between the vendor type tax such as exists in California in which tax reimbursement by the customer is optional rather than mandatory and that of Massachusetts which requires a shift of the tax to the consumer. In that regard, the article states:

> "Massachusetts, in common with a majority of the sales tax states, has a hybrid tax where the tax is treated as a levy on the vendor for the privilege of selling at retail. Thus, subsection 7(a) of section 1 provides that 'no person shall do business in this commonwealth as a vendor unless a registration . . . shall have been issued to him.

This registration may be revoked if the vendor fails to carry out the obligations imposed on him by the law. § 1(7)(c). *The vendor,* however, *is required to shift the burden of the tax onto the consumer and collect it from him,* in accordance with the bracket system. §§ 1(3) and (4)." (Emphasis added).

"Sales taxes in use in the various states at the present time fall into three general classes: vendor taxes, consumer taxes and hybrid taxes. In states imposing a vendor type of levy, the legal basis of the tax is the 'privilege' of engaging in business as a retailer or the privilege of selling at retail. Vendor type taxes do not require a mandatory shifting of the burden of the tax to the consumer although in some states it is provided that the burden be shifted 'in so far as possible' or that the burden 'may' be shifted. The measure of the tax in these cases is either gross receipts or gross proceeds from retail sales.

"In the consumer type of tax, the tax is imposed either upon the retail sale or upon the purchaser, and the measure of tax liability is the selling price. All states imposing a consumer type tax require the vendor to collect the tax from the consumer and remit it to the state. They invariably require that the tax be kept separate from the price of the article and prescribe a bracket system for collection of the tax."

Unlike the Massachusetts sales tax, as demonstrated in the cases discussed above, the California sales tax need not be passed on to the purchaser. In the *Berkshire* case it was recognized that the legal incidence of

the tax was a controlling factor in determining its validity as applied to sales to national banks. In this regard, it was said:

> ". . . The court below held, contrary to appellant's contention, that the Massachusetts sales tax is not imposed upon the bank as a purchaser, but is a tax upon vendors who sell tangible personal property to the bank. *Of course if this is true, the bank cannot object if a particular vendor decides to pass the burden of the tax on to it through an increased price. . . .*" 392 U.S. 339 at 346, 347 (Emphasis added).

This Honorable Court, however, concluded that because the hybrid type Massachusetts statute required the retailer to collect the sales tax from the purchaser, it was therefore violative of section 548 of Title 12 of the United States Code. As pointed out above, the California Supreme Court has expressly held that insofar as the vendor type California sales tax is concerned, there is no mandatory requirement that sales tax reimbursement be obtained from the purchaser.

This significant difference between the vendor type California tax and the hybrid Massachusetts tax was also recognized by Professor John Due, the leading authority in the sales tax field, at page 79 of his book, State and Local Sales Taxation, wherein he states:

> "SALES TO NATIONAL BANKS
>
> "States were limited in their powers to tax national banks by section 5219 of the national banking legislation. As far as sales and use taxes are concerned, the courts, in a series of decisions, held that the states could apply their sales taxes to sales to national banks if the taxes were of

vendor type, but not if they were of the vendee type. Some vendee-tax states, however, did collect tax on sales to national banks, and the banks did not contest the tax. When Massachusetts and New York imposed sales taxes in 1966, both sought to apply tax to sales to national banks, even though the latter state had a strictly vendee tax and the former had a hybrid tax with some vendee characteristics. The lower courts upheld the power of the states to apply the taxes, but the United States Supreme Court, in the case of the First Agricultural National Bank of Berkshire County overruled the lower court and held the bank to be exempt. The consequence was the enactment of federal legislation in 1969 ending restrictions on the power of the states to apply any form of sales and use tax to national banks. Most states proceeded to do so in the following year."

In *Georgia Pacific Corporation v. County of Mendocino,* 357 F. Supp. 380 at page 383, the court stated:

". . . In United States v. Boyd, 378 U.S. 39, 84 S.Ct. 1518, 12 L.Ed.2d 713 (1964) the Court summarized the rulings of its controlling earlier decision as follows:

" 'The Constitution immunizes the United States and its property from taxation by the States, M'Culloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 57, but it does not forbid a tax whose legal incidence is upon a contractor doing business with the United States, even though the economic burden of the tax, by contract or otherwise, is ultimately borne by the United States. James v. Dravo Contracting Co., 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155; Graves v. New York, 306 U.S. 466,

59 S.Ct. 595, 83 L.Ed. 927; Alabama v. King & Boozer, 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3. Nor is it forbidden for a State to tax the beneficial use by a federal contractor of property owned by the United States, even though the tax is measured by the value of the Government's property, United States v. City of Detroit, 355 U.S. 466, 78 S.Ct. 474, 2 L.Ed.2d 424, and even though his contract is for goods or services for the United States. Curry v. United States, 314 U.S. 14, 62 S.Ct. 48, 86 L.Ed. 9; Esso Standard Oil Co. v. Evans, 345 U.S. 495, 73 S.Ct. 800, 97 L.Ed. 1174; United States v. Township of Muskegon, 355 U.S. 484, 78 S.Ct. 483, 2 L.Ed.2d 436. The use by the contractor for his own private ends—in connection with commercial activities carried on for profit—is a separate and distinct taxable activity.' 378 U.S. at 44, 84 S.Ct. at 1521."

In reading the cases, it is clear that the line is clearly drawn between the *Kern-Limerick v. Scurlock*, 347 U.S. 110 (1954), and *King & Boozer, supra.* The most recent citation of *King & Boozer* is in *City of Los Angeles, v. A.E.C. Los Angeles*, 33 Cal. App. 3d 933, at 940, where the court states:

"Thus the fact that a municipal tax is imposed in a fashion which permits its ultimate economic burden to be passed on to a higher governmentality unit does not invalidate it (see General Dynamic Corporation v. County of Los Angeles, 51 Cal.2d 59, 63 [330 Pac.2d 794]; Kaiser Co. v. Reid, supra, 30 Cal.2d 610; Alabama v. King and Boozer, 31 U.S. 1."

King & Boozer was also cited in *United States v. Mississippi Tax Commission*, 37 L.Ed.2d No. 1, in Justice Douglas' dissent. (The fact that it is cited in a dissent may not make it probative, but the fact is that it is still deemed a viable case.) Therein Justice Douglas stated at page 18: "At least since Alabama v. King and Boozer . . . state taxes have been upheld on those doing business with the Federal Government, even as respects cost-plus contracts where the terms of the contract forced their payment out of the federal treasury." Further reference to *King & Boozer* is made in the dissent with reference to an article in 38 North Dakota Law Review 26, entitled "Recent Developments in Sovereign Immunity of the Federal Government from State and Local Taxes," by Lt. Col. Robert O. Rollman, Hq. AFSC. In June of this year a three-judge U.S. District Court in the same *Mississippi Tax Commission* case held that the Mississippi liquor sales tax was on the seller and valid on a federal enclave despite the economic burden on the federal government. *United States v. Mississippi Tax Commission et al.*, U.S. District Court for the Southern District of Mississippi, June 12, 1974, 35 CCH State Tax Review No. 48 pages 3-4 (November 26, 1974).

In summation, it is the Board's position that its interpretations of sections 6384 and 6007.5 are that the sale to the government contractor is the retail sale, and not the sale by the contractor. Also, the line has to be clearly drawn between the use of the property by the contractor for use in the performance of contracts

with the United States for the construction of improvements on or to real property in this state (*King & Boozer* type situation) and contracts for the sale of tangible personal property ("machinery and equipment," as defined in Regulation 1615) and other tangible personal property (*Kern-Limerick*). None of the cases cited by Petitioner establish that *King & Boozer* is not the present law in this area.

IV

The Court of Appeal Did Not Apply the Buck Act and Did Not Err

The Court of Appeal below, on its own motion, felt compelled to deal with the federal enclave question as it was clear that the contracts in question were performed on federal territory within the state of California. The opinion merely takes note of the fact that section 105 of 4 USC permits a sales tax on retailers doing business with the federal government on its enclaves and that section 107 of 4 USC is inapplicable to a tax the legal incidence of which is on the retailers. Therefore, the Court of Appeal did not apply 4 USC section 105 but, in effect, found that the act prevented any application of territorial immunity in this case to the contracts in question. Petitioner has raised no substantial federal question as regards the Buck Act except as it relates to the legal incidence of sales tax which has already been treated under the previous points. Inasmuch as the Court of Appeal correctly followed the federal decisions on the point there is no need for a grant of the writ herein.

Conclusion

This concludes the response to the petition in the instant case. Respondent believes that when the record is examined relative to the matters in issue and the opinion of the California Court of Appeal considered, it will be concluded by this Honorable Court that no right guaranteed by the Constitution of the United States was violated, and that the judgment should stand. Accordingly, respondent submits the matter on the record heretofore presented to this Court, the opinion of the California Court of Appeal and the arguments set forth above, and requests that the relief asked by this Petitioner be denied.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General,

By PHILIP C. GRIFFIN,
Deputy Attorney General,

Attorneys for Respondent.

APPENDIX "1."

Revenue Act of 1932.

The tax imposed under the provisions of the California retail sales tax act of 1933 is an excise tax imposed by the State on the vendor for the privilege of engaging in the business of making sales at retail. For Federal income tax purposes the tax is an allowable deduction as a tax under section 23(c) of the Revenue Act of 1932 to the vendor only, upon whom it is imposed and who is liable for its payment. Where the vendor collects the amount of the tax from the vendee he must include the amount so collected in his gross income. The amount equivalent to the tax paid by the purchaser constitutes additional cost to him of the article purchased.

Advice is required whether the California sales tax, imposed upon the vendor for the privilege of engaging in the business of making sales at retail, is an allowable deduction by the vendor or the vendee for Federal income tax purposes.

The law under which the tax is imposed is the "Retail sales tax act of 1933." Section 3 provides:

> Sec. 3. For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers at the rate of 2½ per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after August 1, 1933, and to and including June 30, 1935; and at the rate of 2 per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after July 1, 1935. Such tax shall be paid at the time and in the manner hereinafter provided and shall be in addition to any and all other taxes.

Other provisions of the law, so far as pertinent to the discussion of the question presented, read as follows:

Sec. 2. The following words, terms and phrases when used in this act have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

* * *

(f) "Gross receipts" means the total amount of the sale price of the retail sales of retailer, including any services that are a part of such sales, valued in money, whether received in money or otherwise, including all receipts, cash, credits and property of any kind or nature, and also any amount for which credit is allowed by the seller to the purchaser, without any deduction therefrom on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, losses or any other expense whatsoever; provided, however, that cash discounts allowed and taken on sales shall not be included, and "gross receipts" shall not include the sale price of property returned by customers when the full sale price thereof is refunded either in cash or by credit, nor shall "gross receipts" include the price received for labor or services used in installing, applying, remodeling or repairing the property sold.

For the purpose of this act the total amount of the sale price above mentioned shall be deemed to be the amount received exclusive of the tax hereby imposed; provided, that the retailers shall establish to the satisfaction of the board that the tax imposed hereunder had been added to the sale price and not absorbed by the retailer.

(g) "Board" means the State Board of Equalization.

* * *

Sec. 8. It shall be unlawful for any retailer to advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax or any part thereof imposed by this act will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

Sec. 8½. The tax hereby imposed shall be collected by the retailer from the consumer in so far as the same can be done. * * *

Sec. 9. The tax levied hereunder shall be a direct obligation of the retailer and shall be due and payable in quarterly installments on or before the 15th day of the month next succeeding each quarterly period * * *.

* * *

Sec. 12. Thirty days after the effective date of this act, it shall be unlawful for any person to engage in or transact business as a retailer within this State, unless a permit or permits shall have been issued to him as hereinafter prescribed. * * *

The tax imposed under the provisions of the California retail sales tax act of 1933 is an excise tax imposed by the State on the vendor for the privilege of engaging in the business of making sales at retail. For Federal income tax purposes the tax is an allowable deduction

as a tax under section 23(c) of the Revenue Act of 1932 to the vendor only, upon whom it is imposed and who is liable for its payment. Where the vendor collects the amount of the tax from the vendee he must include the amount so collected in his gross income. The amount equivalent to the tax paid by the purchaser constitutes additional cost to him of the article purchased.

In the case of a vendor whose books are kept on the accrual basis, the amount of the tax actually accrued during the period covered by his Federal income tax return may be deducted in determining his net income. Where the vendor's books are kept on the cash receipts and disbursements basis, only the amount of the tax actually paid during the period covered by his Federal income tax return may be deducted in determining his net income.

APPENDIX "2."

State Sales Taxes—Inclusion in Federal Aid Unemployment Compensation Administration Grants.

The Social Security Board is authorized to include in its grants under section 302(a) of the Social Security Act to the State of California for unemployment compensation administration an amount representing the California retail sales tax—the legal incidence of which is upon the vendor—which the department of employment or other agency of the State is required to pay in connection with the purchase of supplies and equipment the Board finds necessary for the proper administration of the unemployment compensation laws of that State. 17 Comp. Gen. 223, modified.

Comptroller General Warren to the Federal Security Administrator, January 31, 1942:

With reference to the decision of September 8, 1937, of this office to the Chairman, Social Security Board, 17 Comp. Gen. 223, wherein it was held that the Social Security Board is not authorized to include in its grants to States the amount of the State sales tax which the State agencies are required under State laws to pay in connection with the purchase of supplies and equipment the Board finds necessary for the proper administration of the State unemployment compensation laws, there has been received from Fred E. Stewart, a member of the State Board of Equalization of the State of California, a letter dated December 9, 1941, reading as follows:

> The Department of Employment of the State of California informed us that the Acting Comptroller General of the United States on September 8,

1937, advised the Social Security Board that it was not authorized to include in its grants to this State under the provisions of section 302 (a) of the Social Security Act "the amount of the State sales tax which the State agencies are required under State laws to pay in connection with the purchase of supplies and equipment the Board finds necessary for the proper administration of the State unemployment compensation laws." The reason given in the opinion is that "the appropriation of Federal funds" is not "available for that purpose."

One of the items in the budget which was presented to the Social Security Board by the Unemployment Reserves Commission of this State was "the amount of State sales tax paid in connection with the purchase of supplies and equipment necessary for the administration of the State unemployment compensation laws," and the Social Security Board requested your advice as to whether it was authorized to include in its grants to this State the amounts so itemized and described in the budget. The request, in our opinion, did not disclose the true nature and legal incidence of the California Retail Sales Tax Act.

The Social Security Board has withheld from its grants to the State the budgeted items described above. Vendors selling supplies and equipment to the State of California for use by the department of employment, a State agency, have, accordingly, been unable to collect the full amount of the selling price, which results in confusion and misunderstanding.

The nature of the California tax is set forth in section 3 of the California Retail Sales Tax Act, which provides:

"For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers * * * at the rate of 3% of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State * * *."

The term "retailer" is defined by section 2, subdivision (e) of the act as:

"Every person engaged in the business of making sales at retail * * * of tangible personal property * * *."

The nature of the tax has been uniformly construed by not only the State, but the Federal courts, as a tax upon vendors for the privilege of engaging in business at retail, and its legal incidence has been determined to be upon the seller and not upon the purchaser.

In *Western Lithograph Co. v. State Board of Equalization*, 11 Cal. (2d) 156, 164, the California Supreme Court stated:

"The tax being a direct obligation of the retailer and so far as the consumer is concerned, a part of the price paid for the goods and nothing else, it is neither in fact nor in effect laid upon the consumer. It does not become a tax on the sale nor because of the sale, but remains an excise tax for the privilege of conducting a retail business measure by the gross receipts from sales."

In addition to the *Western Lithograph Co.*, case, *supra*, the following cases definitely place the legal incidence of the tax upon the seller:

Roth Drugs, Inc. v. Johnson, 13 Cal.App. (2d) 720.

Meyer Construction Company v. Corbett, 7 Fed. Supp. 616.

People v. Herbert's of Los Angeles, 3 Cal. App.(2d) 482.

Graham Brothers, Inc. v. City of Los Angeles, 6 Cal.App.(2d) 203.

National Ice & Cold Storage Co. v. Pacific Fruit Express Co., 11 Cal. (2d) 283.

DeAryan v. Akers, 12 Cal. (2d) 781, Certiorari denied by U. S. Supreme Court, Oct. 9, 1939, Mem. 308 U. S. 581.

In *Roth Drugs, Inc. v. Johnson, supra*, the Court stated at page 736:

"This act does not impose the tax on the consumer. The last-mentioned section (sec. 8½) merely authorizes the retail merchant to reimburse himself from the consumer insofar as it may be consistently done. He is not required to do so. He may waive that right. Section 8 of the act merely declares that it shall be unlawful for the retailer to advertise that he will assume and pay the tax or that he will not add it to the price of his merchandising upon sale thereof. In considering the entire act we are impelled to hold it is merely optional with the retail merchant as to whether he will reimburse himself from his customers for the tax he is compelled to pay. The act specifically declares that the tax is imposed on retail

merchants, and not on the consumers. Section 3 provides in that regard, for the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers.' Section 9 of the act further provides that 'The tax levied hereunder shall be a direct obligation of the retailer.' Section 12 of the act prohibits any retail merchants from maintaining his business without first procuring a permit therefor as provided by that measure."

The amount of the purchase price is a matter of contract between the seller and the purchaser, each being free to refrain from selling or buying, as the case may be, except on such terms as to him may seem proper. The seller in order to determine the selling price of the merchandise must as a matter of course consider the amount of property, income, franchise, excise, and similar taxes, which he is called upon to pay by local, State, or Federal Government. Any tax, the legal incidence of which is upon the seller, cannot be disregarded by him in determining the selling price.

On November 10, 1941, the Supreme Court of the United States in two cases, *The State of Alabama v. King and Boozer*, 62 Sup. Ct. 43, 86 L. Ed. (Adv. Op.) 1, and *John C. Curry v. United States*, 62 Sup. Ct. 48, 86 L. Ed. (Adv. Op.) 6, considered the application of the Alabama sales and use taxes in connection with purchases made by "cost-plus-a-fixed-fee" contractors with the Federal Government.

The Court in the *King and Boozer* case stated:

"The Government, rightly we think, disclaims any contention that the Constitution, unaided by

Congressional legislation, prohibits a tax exacted from the contractors merely because it is passed on economically, by the terms of the contract or otherwise, as a part of the construction cost to the Government. So far as such a nondiscriminatory State tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see *Panhandle Oil Co. v. Knox, supra; Graves v. Texas Co., supra,* we think it no longer tenable."

The Court in the *Curry* case in considering the economic effect upon the Government makes the following statement:

"For the reasons stated at length in our opinion in the *King and Boozer* case we think that the contractors, in purchasing and bringing the building material into the State and in appropriating it to their contract with the Government, were not agents or instrumentalities of the Government; and they are not relieved of the tax, to which they would otherwise be subject, by reason of the fact that they are Government contractors. If the State law lays the tax upon them rather than the individual with whom they enter into a cost-plus contract like the present one, then it affects the Government, like the individual, only as

the economic burden is shifted to it through operation of the contract. As pointed out in the opinion in the *King and Boozer* case, by concession of the Government and on authority, the Constitution, without implementation by Congressional legislation, does not prohibit a tax upon Government contractors because its burden is passed on economically by the terms of the contract or otherwise as a part of the construction cost to the Government."

In view of these recent decisions, we respectfully request that you give further consideration to this problem, and that you advise the Social Security Board that it may include in its grants to the State of California the entire amount which the department of employment is required to pay in connection with the purchase of supplies and equipment for the administration of the California Unemployment Reserves Act without the deduction of any amount which may improperly be designated as a tax, but which actually constitutes a part of the purchase price of supplies and equipment.

Section 302(a) of the Social Security Act, 49 Stat. 626, provides, in part—

> The Board shall from time to time certify to the Secretary of the Treasury for payment to each State which has an unemployment compensation law approved by the Board under title IX, such amounts as the Board determines to be necessary for the proper administration of such law during the fiscal year in which such payment is to be made. * * *

The decision of September 8, 1937, *supra*, apparently was predicated to a considerable extent upon the ruling of the Supreme Court of the United States in the case of *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, to the effect that the vendor of gasoline sold to the United States was exempt from the payment of an excise tax measured by the quantity of gasoline sold upon the theory that the tax fell upon the Government. However, a careful examination of the recent decision of the Supreme Court of the United States in the case of *State of Alabama v. King and Boozer*, 314 U.S. 1, 86 L.ed. (Adv. Ops.) 1, leaves little or no room for doubt that a vendor who sells supplies to the United States is not exempt from the payment of a State sales tax upon the transaction unless the legal incidence of the tax is upon the vendee. And the holding of the Supreme Court of California is that the legal incidence of the retail sales tax of that State is upon the vendor (*Western Lithograph Co. v. State Board of Equalization, et al.*, 11 Cal. (2d) 156), so that the tax is not to be regarded as being passed on, as such, to the purchaser. Cf. *Lash's Products Co. v. United States*, 278 U.S. 175.

Such being the case it would appear that the price paid by the department of employment or other agency of the State of California for such supplies or equipment purchased by it as are "necessary for the proper administration" of the State's unemployment compensation laws may not be viewed as including, as such, the tax imposed on vendors by the provisions of the California Retail Sales Tax Act of 1933, as amended, although the sale price of the supplies or equipment may have been increased by reason of the imposition of such tax on the vendor; and as it thus appears that the tax loses its

identity as such and is merged in the purchase price paid by the State agency, the theory that grants which may be made to the State to cover the additional expense would be diverted to the payment of a State tax seems no longer tenable. Cf. decision of August 2, 1940, to you.

Accordingly, in view of the foregoing, I have to advise that the Social Security Board is authorized to include in its grants to the State of California for the purpose set forth in section 302(a) of the Social Security Act the entire amount which the department of employment or other State agency is required to pay in connection with the purchase of supplies and equipment the Board finds necessary for the proper administration of the unemployment compensation laws of that State without the deduction of any amount on account of the additional expense incurred by reason of the tax imposed by the provisions of the California Retail Sales Tax Act of 1933, as amended.

APPENDIX "3."

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20549

April 5, 1968

The Hertz Corporation
660 Madison Avenue
New York, New York 10021

Attention: Mr. Arthur J. Krug, Tax Manager

Gentlemen:

Your letter of March 19, 1968, reports that many of the States and lesser jurisdictions imposing a sales or use tax define "sale" as including "rental or lease," and thus there is a sales or use tax on the rental of motor vehicles. You advise that all but three of those States (namely California, Idaho and South Carolina) exempt from such taxation the rental of a motor vehicle to the United States and its instrumentalities and agencies. Enclosed with your letter are copies of relevant excerpts of the statutes, rules and regulations of the three above-named States.

You state that on many occasions, certain governmental users have not been paying the applicable sales or use tax on the rentals of motor vehicles in the aforementioned jurisdictions. You report that when the rental invoice is sent to the governmental user, the tax is crossed out or otherwise ignored and the net amount only is remitted to Hertz and that repeated billings therefor, and other efforts to collect the tax, have been to no avail. You advise that since Hertz is a collecting tax agent for the taxing jurisdiction, it has been held liable for those uncollected, unpaid taxes.

You request that we review the law of those (three) jurisdictions and furnish you an expression of the Government's position on the taxability of such rentals. Specifically, you request that we furnish you an advisory letter or ruling in the matter and that we send a bulletin or directive to governmental users setting forth their responsibility for the payment of the sales or use tax on the rentals of motor vehicles in the three States.

Concerning the payment of State sales taxes generally, our Office has held that the question of whether the United States is required to pay for an item procured in a State at a price inclusive of the sales tax imposed by that State rests upon a determination of whether the incidence of the tax is on the vendor or on the vendee. Where the incidence of the tax is on the vendor, the United States has no right—apart from State law or State statutory regulations promulgated thereunder by State authorities—to purchase (or lease) items within the territorial jurisdiction of the State on a tax free basis. See *Alabama v. King and Boozer,* 314 U.S. 1; 24 Comp. Gen. 150; 32 Comp. Gen. 423; *id.* 577; 33 Comp. Gen. 453; and 41 Comp. Gen. 719. On the other hand where the incidence of the tax is on the vendee, the United States in purchasing or leasing items for official use is entitled under its constitutional prerogative to make purchases or lease free from State taxes and to recover any amount of such taxes which may have been paid by it.

An examination of the laws of California and South Carolina discloses that the legal incidence of the State sales tax in those States is on the vendor. Hence, the United States is not constitutionally immune from the economic burden of such State taxes if by contract or

otherwise it is liable to the vendor for the amount of the tax. While California law exempts from the computation of the amount of the sales tax the gross receipts from sales to the United States, this exemption does not extend to rentals payable under a lease of tangible personal property. We found no provision of South Carolina law exempting from the computation of the amount of the sales tax, gross receipts from sales or rentals to the United States. Thus, in effect, car rentals by the Government in California and South Carolina would be subject to the State sales tax in those States, unless the rental agreement provides otherwise.

As to the State of Idaho, the enclosures with your letter indicate that the legal incidence of the Idaho sales tax is on the consumer. Hence, sales to the Federal Government and its agencies are not subject to the Idaho sales tax.

Concerning the "use" tax in the three States mentioned, since the legal incidence of a use tax is on the user of the tangible personal property, the United States is constitutionally immune from such tax, or a payment in lieu thereof.

Concerning your request that governmental users in the three States be sent a bulletin or directive setting forth their responsibility for the payment of the sales or use tax on the rentals of motor vehicles, almost all Federal agencies receive bound volumes of the decisions of the Comptroller General. Included in the bound volumes are the decisions of the Comptroller General cited above (as well as others), concerning the application of State sales taxes to sales to the United States. Thus, we see no necessity for issuing a bulletin or directive in the matter. Moreover, if your claim for payment of a

State sales tax on the rental of a motor vehicle is denied by the Federal agency involved and you feel that such denial was erroneous you may submit the claim here for consideration. The claim together with a recitation of the facts and circumstances giving rise thereto and any supporting papers should be sent to:

Claims Division
U.S. General Accounting Office
Washington, D.C. 20548.

Very truly yours,

/s/ J. H. Coffey
Assistant General Counsel

LIBRARY
SUPREME COURT, U. S.

FILED
JAN 14 1975
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1974
No. 74-261

C. R. FEDRICK, INC., a Corporation
Petitioner

vs.

THE STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA
Respondent

PETITIONER'S REPLY TO RESPONDENT'S OPPOSING BRIEF

CLYDE R. MAXWELL
567 San Nicolas Drive
Suite 209
Newport Beach, California 92660
(714) 570-8123

KARL F. GEISER
424 S. Beverly Drive
Beverly Hills, California 90212
(213) 879-3611

Attorneys for Petitioner

J. GALLAGHER — PRINTED BRIEFS (714) 547-6073

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	
I. PETITIONER IS NOT PRECLUDED FROM RAISING THE CONSTITUTIONAL QUESTIONS PRESENTED BY IT HEREIN. SUCH QUESTIONS WERE PROPERLY RAISED IN THE CALIFORNIA COURTS	1
II. SECTIONS 6384 AND 6007.5 OF THE CALIFORNIA REVENUE & TAXATION CODE ..... ARE UNCONSTITUTIONAL	8
III. REVENUE AND TAXATION CODE SECTION 6384 DOES VIOLATE THE SOVEREIGN AUTHORITY OF THE UNITED STATES... . . .	10
CONCLUSION	14

TABLE OF AUTHORITIES

Page

Cases Cited:

People v. Baldwin, 278 Ill. App. 327,333 . . 5

Burns v. Ross, 190 Cal 269,276 (212 P 17) . . 5

People v. Davies, 35 Ill. 168 (188 NE 337,340) 5

Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U S 95,99, 62 S.Ct. 1,3, 86 L.Ed. 65 12

First Agricultural National Bank of Berkshire County v. State Tax Commission, 392 U S 339, 88 S. Ct. 2173 (1968) 11

General Electric Co. v. State Board of Equalization, 111 C A 2d 180, 244 P 2d 427 . . 6,7

King v. State Board of Equalization (1972), 22 C A 3d 1006,1014 6

Moses Lake Homes v. Grant County (1961), 365 U S 744,751, 81 S.Ct. 870 6,7,9,10

Phillips Chemical Co. v. Dumas Independent School District (1960), 361 U S 376,387, 80 S.Ct. 474 6,7,9,10

People v. Ross (1961), 198 C A 2d 723 . . . 4

Standard Oil Co. v. State Board of Equalization (1965), 232 C A 2d 91,96, 42 C Rptr 543 6,7

People v. Ward, 89 Cal App 2d 467,471 (200 P 2d 867) 4

Texts:

4 Cal Jur 2d Sec. 483, p. 317 5

24 C J S, Sec. 1846, p. 704 5

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1974
No. 74-261

C.R. FEDRICK, INC., a corporation,
Petitioner

-vs-

THE STATE BOARD OF EQUALIZATION OF
THE STATE OF CALIFORNIA,
Respondent

PETITIONER'S REPLY TO
RESPONDENT'S OPPOSING BRIEF

ARGUMENT

I

PETITIONER IS NOT PRECLUDED FROM RAISING THE CONSTITUTIONAL QUESTIONS PRESENTED BY IT HEREIN. SUCH QUESTIONS WERE PROPERLY RAISED IN THE CALIFORNIA COURTS.

Reference is made on page 7 of Respondent's Opening Brief (hereinafter ROB) to Sections 6932 and 6933 of the California Revenue & Taxation Code (hereinafter R & T Code).

Section 6932 provides that no suit or proceedings shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been duly filed with the State Board of Equalization.

Section 6933 is quoted as follows:

"6933. Action for Refund; limitation. Within 90 days after the mailing of notice of the Board's action upon a claim filed pursuant to Article 1 of this Chapter, the claimant may bring an action against the Board on the grounds set forth in the claim in a court of competent jurisdiction in any city or city and county of this state in which the Attorney General has an office for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.

"Failure to bring action within the time specified constitutes a waiver of any demand against the State on account of alleged overpayments."

Paragraph 3 of Petitioner's Claim for Refund stated:

"Items of machinery and equipment were installed by this taxpayer for the use of the United States Government at various locations in the State of California, Use and Sales Tax being paid due on an erroneous interpretation of Rule 12 of the State Board of Equalization." (C.T. page 5).

Under a liberal construction, this claim could be

construed as permitting the raising of the constitutional issues raised herein, but in any event, in the complaint which petitioner filed in its action for refund upon denial of Petitioner's claim by Respondent, the Petitioner claimed that the items in question constituted "machinery and equipment", hence exempt under the express provisions of Regulation 1615 (formerly Rule 12) of the Respondent, and particularly that provision relating to "machinery and equipment" which is as follows:

> "Tax does not apply to sales of 'machinery and equipment' to contractors or subcontractors. ..." (Page 38 of Appendix to Petition).

And in the Trial Court's Findings of Fact and Conclusions of Law (pages 25 to 34 of the Appendix to Petition) the Trial Court found as a fact that the items in question were machinery and equipment.

However, the contention was made by the Respondent herein (hereinafter "State Board") as stated by the California Court of Appeal, in outlining the contentions (pages 5 and 6 of Appendix to Petition) as follows:

> "1. Board contends that the use of Fedrick for various items of tangible personal property in the performance of the contract with the United States Government for the construction of improvements to California real property was a taxable use under Sections 6384, 6094, and 6202 (R & T Code)."

This statement of the State Board's contentions clearly in-

vites scrutiny as to the constitutionality of said Section 6384, R & T Code.

Furthermore, the language of the letter from the California Court of Appeal requesting additional argument quoted on page 6 ROB expressly invited argument on this point as follows:

> "That is to say, does Revenue & Taxation Code Sec. 6384 violate the sovereign authority of the Federal Government?"

It is well settled under the law of California that an Appellate Court may decide a case on any point that its proper disposition may seem to require, whether or not such claim is argued.

In the case of People vs. Ross (1961), 198 C A 2d 723, the Court held that failure to prove an essential element of the corpus delecti though not raised in the briefs was a fatal defect and reversed the judgment of conviction even though the point had not been raised in the briefs. The Court says at page 730 of the Opinion:

> "The fact that counsel has not presented the specific point upon which this decision turns cannot deter us from seeing that justice is done. In People v. Ford, 89 Cal App 2d 467, 471 (200 P 2d 867), it is said: 'Although the briefs filed by the present counsel of appellant, who did not represent him at the trial, do not raise the ques-

tion of misconduct, we cannot ignore it. The mere oversight of the attorney for an accused to present a serious claim of error which is justified by the record furnishes no excuse for the perpetuation by the reviewing court of an obvious injustice. Its duty to see that the substantial rights of the accused are protected may not be thus circumscribed.' (6) People v. Davies, 354 Ill. 168 (188 N.E. 337,340): 'The rule, however, that the alleged errors of the trial court not argued or called to the attention of the Appellate Court will be held to have been waived and cannot be raised for the first time in this court is not an unbending rule. If this court can see that grave injustice has been done by the conviction of the defendant, it will review the evidence.'

"People v. Baldwin, 278 Ill. App. 327,333: 'While, generally, a reviewing court will only consider alleged errors argued or brought to the attention of the court, the rule is not inflexible; and where it is apparent that its application will result in injustice, it will not be blindly followed. (See also 4 Cal Jur 2d Sec. 483, p. 317: 24 CJS Sec 1846, p. 704.) This is but an application of the rule frequently applied on the civil side. See Burns v. Ross, 190 Cal 269, 276 (212 P 17).

"Judgment and order reversed."

In the Supplemental Brief filed by the Petitioner herein in response to the invitation from the California Court of Appeal, the following points, among others, were made:

"II. REVENUE & TAXATION CODE SECTION 6384 DOES VIOLATE THE SOVEREIGN AUTHORITY OF THE UNITED STATES.

"A. THIS SECTION DISCRIMINATES UNCONSTITUTIONALLY AGAINST THE UNITED STATES AND THOSE WITH WHOM IT DEALS.

"B. REVENUE & TAXATION CODE SECTION 6384 DOES VIOLATE THE SOVEREIGN AUTHORITY OF THE UNITED STATES BECAUSE THE FEDERAL GOVERNMENT BEARS THE INCIDENCE OF THE TAX ASSESSED UNDER SECTION 6384."

In support of proposition II A, Petitioner herein cited the case of Phillips Chemical Company vs. Dumas Independent School District (1960), 361 U S 376, 387, 80 S. Ct. 474, and Moses Lake Homes v. Grant County (1961), 365 U S 744,751, 81 S.Ct. 870.

In support of proposition II B, above, Petitioner herein cited and relied upon the following cases, among others: First Agricultural National Bank vs. State Tax Commission (1968), 392 U S 339,347, 88 S.Ct. 2173; Standard Oil Company vs. State Board of Equalization (1965), 232 C A 2d 91,96, 42 C Rptr 543; King vs. State Board of Equalization (1972), 22 C A 3d 1006, 1014.

In its Petition for rehearing to the California Court of Appeal, the petitioner herein drew the Court's attention to the inconsistency of its opinion herein when contrasted with the care of General Electric Co. vs. State

Board of Equalization, 111 C A 2d 180, 244 P 2d 427 (1952), and to the case of Standard Oil Company vs. State Board of Equalization, 232 C A 2d 91, 43 C Rptr 543 (1965), discussed at pages 15 to 19 of Petition herein.

In petitioner's Petition for Hearing in the Supreme Court of California, the following points were raised:

> "THE COURT OF APPEAL OPINION IS CONTRA TO LONG STANDING DECISIONS AND ITS FAILURE TO DISTINGUISH BETWEEN THE SALES TAX AND THE USE TAX RESULTS IN AN UNCONSTITUTIONAL DISCRIMINATION AGAINST THE FEDERAL GOVERNMENT AND THE PERSONS WITH WHOM IT DEALS."

In support of this proposition, Petitioner cited the Standard Oil case, the General Electric case, all supra.

> "THE OPINION HERE, IF PERMITTED TO STAND, WOULD CONSTITUTE AN UNCONSTITUTIONAL DISCRIMINATION AGAINST THE FEDERAL GOVERNMENT AND THOSE WITH WHOM IT DEALS."

In support of this proposition, Petitioner cited and discussed the case of Phillips Chemical Co. and Moses Lake Homes, supra, as well as the General Electric case and the following sections of the R & T Code: 6381, 6384, 6007.5 and Regulations 1521 and 1615 of Title 18 of the California Administrative Code (Formerly Rules 11 and 12).

Accordingly, it is respectfully submitted that the contentions of the Petitioner herein have been properly submitted to and considered by the California courts.

II

SECTIONS 6384 AND 6007.5 OF THE CALIFORNIA REVENUE & TAXATION CODE AND SECTIONS 1521 AND 1615 OF THE CALIFORNIA ADMINISTRATIVE CODE AS INTERPRETED AND APPLIED BY THE RESPONDENT BOARD ARE UNCONSTITUTIONAL AND DISCRIMINATORY AGAINST THE FEDERAL GOVERNMENT.

Division II (pages 8 to 22 ROB) is an excellent example of circular reasoning.

The Respondent quotes those provisions of Ruling 11 and Ruling 12 (respectively Section 1521 and 1615 of Title 18 of the California Administrative Code) and concludes that the inconsistencies between the treatment accorded to construction contractors for individuals or the State of California on the one hand, and construction contractors dealing with the Federal Government on the other, are required by Section 6384 of the R & T Code and then states (page 11 ROB) that:

> "Section 6384 is not designed to discriminate against the United States or its contractors. It is designed to define the limits of the statutory exemption granted to the United States by California. It does not have any bearing on or relation to the United States constitutional tax exemption of the United States Government ..."

It is respectfully submitted that even if the design of this statute was to define the limits of the statutory exemption which the State of California was willing to grant to the United States Government, nevertheless that does not foreclose scrutiny by this Court of the statute in the context of the United States Constitution and laws thereunder.

The language quoted above would appear to lead to the conclusion that the State of California has the power to tax United States Government and its instrumentalities and agencies without regard to the supremacy clause of the United States Constitution, Section 107 of the "Buck Act" (Title 4 USC Sec. 107), and without regard to those cases, particularly Phillips Chemical and Moses Homes, supra, holding that any action of a state discriminating against the Federal Government is void and unconstitutional.

This entire Division II of Respondent's opposing brief begs the questions raised by Petitioner herein.

Respondent has skillfully attempted to avoid, and does not answer, the basic arguments of Petitioner, which are simply stated as follows:

1. This case involved (among other items) a standby electric generator designed to furnish an alternate power source for airport runways which was housed in a building specifically built and designed for the purpose of housing the generator.

2. In the General Electric, supra, case the turbine generator involved there was housed in a building constructed especially for that purpose.

3. In General Electric, the California court held that the installation of the generator constituted a sale to Pacific Gas & Electric Company and hence was subject to sales tax.

4. Section 6384 R & T Code attempts to levy a use tax upon the contractor and not a sales tax, because to impose a sales tax on the United States Government or its instrumentalities or the persons with whom it deals is beyond the power of the state.

5. Therefore, identical transactions are sales under the General Electric case when made to an individual, private corporation, or to the State of California or any of its subdivisions, but a use subject to use tax when made to the United States Government or those with whom it deals.

6. This constitutes an impermissible and unconstitutional discrimination prohibited by the Phillips Chemical and Moses Homes, supra, and by the supremacy clause of the United States Constitution.

III

REVENUE AND TAXATION CODE SECTION 6384 DOES VIOLATE THE SOVEREIGN AUTHORITY OF THE UNITED STATES BECAUSE THE FEDERAL GOVERNMENT DOES BEAR THE LEGAL INCIDENCE OF THE TAX.

In this division of Respondent's opposing brief, the Respondent seeks to undermine the decision of this Court in the case of First Agricultural National Bank of Berkshire County vs. State Tax Commission, 392 U S 339, 88 S.Ct. 2173 (1968) by citing a number of California cases which hold that the "legal incidence" of the sales tax is on the retailer.

However, it is respectfully submitted that this Honorable Court is in no sense restricted by any characterizations by the California courts as to the nature of the tax, nor its "legal incidence". That question was settled by the First Agricultural National Bank case where it was expressly held that this Court is not bound by any state court's characterization of a sales tax and that this is a determination which this Court is free to make.

Mr. Justice Black, speaking for the Court, says at page 2177 of the Opinion as reported in the Supreme Court Reporter:

> "... Because the question here is whether the tax affects Federal immunity, it is clear that for this limited purpose we are not bound by the state court's characterization of the tax (citations) and essentially the same question for us is: On whom does the incidence of the tax fall? (Citations)."

The Court then goes on to hold that:

> "(6,7) It would appear to be indisputable that a sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon

the purchaser. See Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U S 95,99, 62 S.Ct. 1,3, 86 L.Ed. 65. Subsection 3 of the Massachusetts sales tax provides:

> "'Reimbursement for the tax hereby imposed shall be paid by the purchaser to the vendor and each vendor in this commonwealth shall add to the sales price and shall collect from the purchaser the full amount of the tax imposed by this section, or an amount equal as nearly as possible or practicable to the average equivalent thereof; and such tax shall be a debt from the purchaser to the vendor, when so added to the sales price, and shall be recoverable at law in the same manner as other debts.' Acts and Resolves, 1966, c. 14, Sec. 1, subsec. 3. (Emphasis added.)

"This subsection reads to us as a clear requirement that the sales tax be passed on to the purchaser. And this interpretation is reinforced by subsection 23 which prohibits as unlawful advertising the holding out by any vendor that he will assume or absorb the tax on any sale that he may make. We cannot accept the reasoning of the court below that simply because there is no sanction against a vendor who refuses to pass on the tax (assuming this is true), this means the tax is on the vendor. There can be no doubt from the clear wording of the statute that the Massachusetts Legislature intended that this sales tax be passed on to the purchaser. For our purposes, at least, that intent is controlling.

And it seems clear to us that the force of the law, especially the language in subsection 3, is such that, regardless of sanctions, businessmen will attempt, in their everyday commercial affairs, to conform to its provisions as written.

"(8) For these reasons we reverse and hold that appellant is immune from both the Massachusetts use and sales taxes.

"Reversed."

The provisions of the Massachusetts sales tax statutes referred to in the opinion would appear to be substantially identical with the provisions of the R & T Code set forth at pages 58 to 61, inclusive, Appendix IV to Petition.

Section 6052 requires the retailer to collect the tax from the consumer insofar as it can be done. Section 6052.5 sets up the sales tax reimbursement schedule clearly evidencing an intent upon the part of the Legislature that the tax be collected from the customer. Section 6053 makes it a misdemeanor for the retailer to advertise or hold out that the tax will be assumed or absorbed or refunded. Section 6054 provides that the Board may require a separate statement by the retailer to the consumer of the tax. Section 6054.5 provides that the customer may recover from the retailer any tax in excess of the correct amount.

CONCLUSION

For the foregoing reasons and for all of the reasons urged in its Petition, Petitioner respectfully renews its request for the issuance of a Writ of Certiorari herein.

Dated this 9th day of January, 1975.

Respectfully submitted,

CLYDE R. MAXWELL, Esq.
567 San Nicolas Drive, Ste. 209
Newport Beach, Calif. 92660
(714) 570-8123

KARL F. GEISER
424 S. Beverly Drive
Beverly Hills, Calif. 90212

by _____

Attorneys for Petitioner

PROOF OF SERVICE

State of California)
County of Riverside)ss

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of 18 years and not a party to the within entitled action; my business address is 1509 N. Main, Santa Ana, California.

On January , 1975, I served the within PETITIONER'S REPLY TO RESPONDENT'S OPPOSING BRIEF on the interested parties in said action by placing three (3) true copies in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed to:

Philip C. Griffin
Office of the Attorney General
600 State Building, 217 W. First St.
Los Angeles, California 90012

I CERTIFY under penalty of perjury that the foregoing is true and correct.

Executed on January , 1975, at Santa Ana, California.

JACK GALLAGHER